Supreme Court, U.S.
FILED
MAR 26 2004
OFFICE OF THE CLERK

No. 03-1368

In The Supreme Court of the United States

PETER FARRELL SUPERCARS, INC.
and
PETER FARRELL,

Petitioners,

v.

GORDON MONSEN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Richard S. Sternberg
Counsel of Record
Metropolitan Washington
Law Consortium, PLLC
751 Rockville Pike, Suite 7
Rockville, Maryland 20852
(202) 530-0100

Counsel for Petitioners

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, Virginia 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

QUESTIONS PRESENTED FOR REVIEW

1. Whether the trial court erred in finding and retaining supplementary jurisdiction where the initial claim of federal question jurisdiction was utterly meritless, the supplementary claims did not arise from the same nucleus of operative facts, and the parties and the trial court allowed the matter to proceed past the motion to dismiss in order to seek the bootstrap jurisdiction of United Mineworkers v. Gibbs.

2. Whether the court of appeals erred in applying the wrong standard of review to the trial court's finding of federal question and supplementary jurisdiction.

3. Whether the absence of federal question jurisdiction is cured by diversity jurisdiction, which did not exist at the time of filing, and was created by the trial court's decision on motions to dismiss under the Fifth Circuit ruling in Grupo Dataflux v. Atlas Global Group.

PARTIES TO THE PROCEEDING BELOW

The parties to the proceedings below are:

Peter Farrell Supercars, Inc. and Peter Farrell ("Farrell") (plaintiff/counterdefendant/appellant/petitioner);

Gordon Monsen ("Monsen") (defendant/counter-plaintiff/respondent);

David C. Penner ("Penner") (defendant, settled and dismissed below);

John Robert Duff, Jr. ("Duff") (defendant, dismissed below);

Malloy Woodbridge, LLC ("Malloy Woodbridge") (defendant, voluntarily dismissed below after Rule 11 warning); and

Malloy Lincoln Mercury, Inc. ("Malloy Lincoln Mercury") (defendant, voluntarily dismissed below after Rule 11 warning).

CORPORATE DISCLOSURE STATEMENT

Peter Farrell Supercars, Inc., is a privately held corporation having no parent corporations, and no part of its stock is held by a publicly held corporation or other publicly held entity. No other publicly held corporation or other publicly held entity has a direct financial interest in the outcome of the litigation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW I
PARTIES TO THE PROCEEDING BELOW II
CORPORATE DISCLOSURE STATEMENT II
TABLE OF CONTENTS III
TABLE OF AUTHORITIES V
OPINION BELOW 1
STATEMENT OF JURISDICTION 1
STATUTORY PROVISIONS INVOLVED 1
STATEMENT OF THE CASE 1
REASONS FOR GRANTING THE PETITION 9

I. This case should be consolidated with Grupo so this Court can explain the limitations, if any, of retroactive assertions of jurisdiction 9

A. Whether the trial court lacked subject matter jurisdiction over the counterclaims because the counterclaims fail to arise from a common nucleus of operative facts as the Federal claim, and whether the appeals court correctly applied an abuse of discretion standard to 28 U.S.C. § 1367(a) 10

B. Whether the trial court abused its discretion by failing to dismiss the counterclaims once it dismissed the federal claim after sua sponte raising the issue of jurisdiction ab initio 16

C. Whether, as held by the trial court and not rejected by the court of appeals, the diversity of the final two defendants can rescue subject matter jurisdiction where there were diverse parties at the time the case was filed 18

II. The case should be reviewed to resolve a split in the circuits over whether jurisdiction can be resolved retroactively from time of judgment..... 19

III. The case should be reviewed to resolve a dispute in the circuits over the proper standard of review where supplementary jurisdiction is asserted and retained after the dismissal of the federal jurisdictional basis..... 21

IV. The case should be reviewed to fashion a policy that does not favor or require attorneys to represent their clients zealously by pleading and then retreating from federal question jurisdiction in order to manufacture supplementary jurisdiction..... 22

CONCLUSION 30

APPENDIX

TABLE OF AUTHORITIES

Page(s)

Cases

Atlas Global Group, L.P. v. Grupo Dataflux,
312 F.3d 168 (5th Cir. 2002) ..... *passim*

Baggett v. First Nat'l Bank of Gainesville,
117 F.3d 1342 (11th Cir.1997) 21

Banner Indus. of N.Y., Inc. v. Sansom,
830 F.Supp. 325 (S.D. W. Va. 1993) 23

Bell v. Hood,
327 U.S. 678 (1946) 24

Bonenberger v. Plymouth Township,
132 F.3d 20, 1997 U.S. App. LEXIS 35507, 4,
77 Fair Empl. Prac. Cas. (BNA) 1242,
72 Empl. Prac. Dec. (CCH) P45,083 (3d Cir. 1997) 22

Borne v. A&P Boat Rentals No. 4, Inc.,
755 F.2d 1131 (5th Cir. 1985), 1 FR Serv. 3d 220,
later 780 F.2d 1254 (5th Cir. 1985) 27

Borough of W. Mifflin v. Lancaster,
45 F.3d 780 (3d Cir. 1995) 17

Bray v. Alexandria Women's Health Clinic,
506 U. S. 263 (1993) 24

Brazinski v. Amoco Petroleum Additives Co.,
6 F.3d 1176 (7th Cir. 1993) 17

Brown v. Lucky Stores, Inc.,
246 F.3d 1182 (9th Cir. 2001) 22

Capron v. Van Noorden,
6 U.S. (2 Cranch) 126 (1804) 10

Caterpillar, Inc. v. Lewis,
519 U.S. 61 (1996) 9, 21

Demulso Corp. v. Tretolite Co.,
74 F.2d 805 (10th Cir. 1934) 27

Diven v. Amalgamated Transit Union & Local 689,
38 F.3d 598 (D.C. Cir. 1994) 17

Doe v. Norwest Bank Minn., N.A.,
909 F.Supp. 668 (D.Minn. 1995),
aff'd on other grounds,
107 F.3d 1297 (8th Cir. 1997) 17

Executive Software N.Am., Inc. v. U.S.District Court,
24 F.3d 1545 (9th Cir. 1994) 17

Field v. Volkswagenwerk AG,
626 F.2d 293 (3d Cir. 1980) 20

Four Hundred & Forty-Three Cans v. United States,
226 U.S. 172, 57 L.Ed. 174, 33 S.Ct. 50 (1912) 27

Gard v. Teletronics Pacing Sys., Inc.,
859 F. Supp. 1349 (D. Colo. 1994) 20

Goldsmith v. Mayor & City Council of Baltimore,
845 F.2d 61 (4th Cir. 1988) 20

Hagen v. Payne,
222 F. Supp. 548 (W.D. Ark. 1963) 20

Hatch v. Town of Middletown,
311 F.3d 83, 2002 U.S. App. LEXIS 23747,
at note 2, at 3 (1st Cir. 2002) 22

Hayburn's Case,
2 Dall. 409 (1792) 25

In re Stable Mews Assoc.,
778 F.2d 121 (2d Cir. 1985), 13 BCD 1251,
CCH Bankr.L.Rptr ¶ 70871 27

Itar-Tass Russian News Agency v. Russian Kurier,
140 F.3d 442 (2d Cir. 1998) 17

Kansas Pub. Employees Retirement Sys. v.
Reimer & Koger, Inc.,
77 F.3d 1063 (8th Cir. 1996) 17

Kontrick v. Ryan,
2004 U.S. LEXIS 663, at 26 (Jan. 14, 2004). 10

Lang v. Windsor Mount Joy Mut. Ins. Co.,
487 F. Supp. 1303 (E.D. Pa. 1980) 20

LaShawn A. v. Berry,
87 F.3d 1389 (D.C. Cir. 1996).....17

LaSorella v. Penrose St. Francis Healthcare Sys.,
818 F.Supp. 1413 (D.Coro. 1993) 17

Lyons v. Weltmer,
174 F.2d 473 (4th Cir. 1949) (per curiam).....20

Maguire v. Marquette University,
814 F.2d 1213 (7th Cir. 1987) 17

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803).....9

Mason v. Richmond Motor Co., Inc.,
625 F.Supp. 883 (E.D. VA. 1986), *aff'd*,
825 F. 2d 407 (4th Cir. 1987) 11, 12

Milan Express, Inc. v. Averitt Express, Inc.,
208 F.3d 975, 2000 U.S. App. LEXIS 6446, 12,
46 Fed. R. Serv. 3d (Callaghan) 895 (11th Cir. 2000),
later appeal 254 F.3d 966,
2001 U.S. App. LEXIS 13734 (11th Cir. 2001).....21

Murray v. Brancato,
290 NY 52 (1942).....26

Muskrat v. United States,
219 U. S. 346 (1911).....25

Oh v. Ford Motor Co.,
79 F. Supp. 2d 1375 (N.D. Ga. 1999) 20

Oneida Indian Nation of N. Y. v. County of Oneida,
414 U. S. 661 (1974).....24, 27

Painter v. Harvey,
863 F.2d 329 (4th Cir. 1988) ..... *passim*

Palmer v. Hospital Auth.,
22 F.3d 1559 (11th Cir. 1994) 17

Patten v. Foley's,

66 Fed. Appx. 188, 2003 U.S. App. LEXIS 11383,
9-10 (10th Cir. filed June 6, 2003) 21

Pejepscot Indus. Park, Inc. v. Maine Cent. R.R. Co.,
215 F.3d 195 (1st Cir. 2000) 22

Rodriguez v. Doral Mortgage Corp.,
57 F.3d 1168 (1st Cir. 1995) 17

Romero v. International Terminal Operating Co.,
358 U. S. 354 (1959) 24

Rowland v. Patterson,
882 F2d 97 (4th Cir. 1989) 19

Russell v. Harrison,
562 F. Supp. 467 (N.D. Miss. 1983) 20

Saadeh v. Farouki,
107 F.3d 52 (D.C. Cir. 1997) 10, 19, 20, 21

Schlesinger v. Reservists Comm. to Stop the War,
418 U. S. 208 (1974) 25

Shanaghan v. Cahill,
58 F.3d 106 (4th Cir. 1995) 7, 22, 26, 27

Slaughter v. Toye Bros. Yellow Cab Co.,
359 F.2d 954 (5th Cir. 1966) 20

Steel Co. v. Citizens for A Better Environment,
523 U.S. 83, 118 S.Ct. 1003,
140 L.Ed.2d 210 (1998) ..... *passim*

Sue & Sam Manufacturing Co. v. B-L-S Construction Co.,
538 F.2d 1048 (4th Cir. 1976) ..... *passim*

The Fair v. Kohler Die & Specialty Co.,
228 U. S. 22 (1913) 24

Tritchler v. Poole,
2004 U.S. App. LEXIS 2593, 3,
93 Fair Empl. Prac. Cas. (BNA)
378 (9th Cir. filed February 18, 2004) 22

United Mine Workers of America v. Gibbs,

383 U.S. 715, 86 S.Ct. 1130,
16 L.Ed.2d 218 (1966) 16, 17

United States v. Richardson,
418 U. S. 166 (1974) 25

Wiggins v. North American Equitable Life Assurance Co.,
644 F.2d 1014 (4th Cir. 1981) 22

Statutes

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 1

28 U.S.C. § 1332(a) 27

28 U.S.C. § 1367 ..... 1, 22, 23, 29

28 U.S.C. § 1367(a) 10, 21

28 U.S.C. § 1367(b) 21

28 U.S.C. § 1367(c) 7, 21

28 U.S.C. § 1367(c)(2-4) 16

28 U.S.C. § 1367(c)(3) 21

28 U.S.C. § 1367(c)(4) .....

28 U.S.C. § 1367(d) 29

Rules

4th Cir. Local Rule 41.2 1

Fed. R. App. P. 41(d)(2) 1

Fed. R. Civ. P. 5(b)(1) 5

Fed. R. Civ. P. 11 ..... *passim*

Fed. R. Civ. P. 11(c)(2)(A), ... 29

Fed. R. Civ. P. 11(c)(2)(B) 29

Fed. R. Civ. P. 13(a) 11, 14

Fed. R. Civ. P. 13(b) 11, 14

Virginia Supreme Court Rules
(Professional Responsibility) 6:2-1 29

Secondary Materials

16 Moore's Federal Practice,
Supplementary Jurisdiction § 106.60[1] 17

4 Am Jur. 2d., Appellate Review, § 76, at 701 (1995 ed.) 27

5A C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE SECTION 1350, p. 196, n. 8 and cases cited (2d ed. 1990) 24

6 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE, §§ 1414, 1422 14

OPINION BELOW

The trial court's order denying the motion to dismiss and the post-trial motion for new trial, etc. are unpublished. The trial court's orders were entered in Civil Action No. 01-1073-A, *Farrell v. Monsen*, in the United States District Court for the Eastern District of Virginia, Alexandria Division. *See* App. Tabs B & C. The court of appeals opinion and order is an unpublished opinion entered in Appeal No. 02-2230, *Farrell v. Monsen*, in the United States Court of Appeals for the Fourth Circuit. *See* App. Tab A. The denial of the Petition for Rehearing & Petition for Rehearing En Banc or, In the Alternative, Motion to Publish Opinion Under Local Rule 36(b) was entered on December 30, 2003. *See* App. D.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit sought to be reviewed was entered on December 3, 2003. A petition for rehearing *en banc* and petition for panel rehearing were timely filed. The petitions were denied on December 30, 2003. *See* App. Tab D. This Court has jurisdiction under 28 U.S.C. § 1254(1). On January 9, 2004, the Fourth Circuit denied a motion to recall its mandate pending the filing of this petition pursuant to the Federal Rules of Appellate Procedure, F.R.A.P. 41(d)(2) and 4th Cir. Local Rule 41.2, and a supercedeas bond remains in effect in the trial court.

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the federal question statute, 28 U.S.C. § 1331, and the supplementary jurisdiction statute, 28 U.S.C. § 1367, are reproduced in the appendix to this petition. *See* App. E.

STATEMENT OF THE CASE

Petitioner is an automobile performance products manufacturer and modifier of race and specialty sports cars. After discharging defendant Duff for dishonesty, Mr. Farrell reported Mr. Duff's criminal behavior to appropriate authorities. Mr. Duff threatened to ruin Mr. Farrell's

business if he persisted in the charges. Mr. Farrell did not relent. Mr. Duff was eventually sentenced to five years incarceration for embezzlement by the state of Virginia.

Mr. Duff made good his threat, however. He began a pattern of defaming Mr. Farrell and his company in Internet forums and bulletin boards for sports car enthusiasts. He located customers of plaintiff who had long-dead disputes, and he persuaded them to join in his defamation. He obtained the involvement of a competitor in his efforts to harm Mr. Farrell's business.

In this niche market serving sports car enthusiasts, Mr. Farrell perceived the attacks as potentially devastating to the business and reputation he had built over the course of ten years. After consultation with his friend and personal lawyer, John Bell, Esquire, plaintiff determined to file suit against the most prolific and aggressive defamers. They chose the court Mr. Bell thought most likely to provide the quickest relief – the Eastern District of Virginia – affectionately and commonly referred to by lawyers in the Washington metropolitan area as "the Rocket Docket."

Plaintiff filed a questionable federal question claim under the Lanham Act, along with prolific and ponderous supplementary state defamation claims. *See,* COMPLAINT, at JA 18, *et seq.*[1] No assertion of diversity jurisdiction was made, since it would have been improper on the face of the complaint. Both plaintiffs are residents and citizens of the Commonwealth of Virginia, as are defendants Malloy Woodbridge, LLC, and Malloy Lincoln Mercury, Inc. The docket sheet correctly notes that jurisdiction is based on federal question. CIVIL DOCKET SHEET, at 1, JA 1.

Plaintiffs filed a thirty-page complaint alleging a Lanham Act conspiracy along with specific libels and other torts by Messrs. Duff, Penner, and Monsen and the

---

1 Citations to the Joint Appendix refer to the appendix in the court of appeals. Petitioner excludes unessential items from the Appendix, but will happily provide a supplemental appendix if it please the Court. References to this Court's Appendices appear as App.

competing Malloy entities alleged to be in league with them. Defendant filed no motion to dismiss the federal count until March 15, 2002, choosing to answer and make his state claims on August 27, 2001. Defendant Monson filed poorly pled counterclaims for breach of contract in the performance upgrade of his car as well as fraud and tort claims that arise from the facts of that breach of contract. No independent basis for federal jurisdiction was pled. Mr. Farrell initially answered on September 21, 2001, but moved to dismiss on March 1, 2002. Mr. Monsen responded with a motion to dismiss Mr. Farrell's federal and supplementary claims on March 15, 2002, and a motion to amend his counterclaims. Judge Ellis denied the motions without prejudice to re-bring them before the trial judge. On April 25, 2002, after refiling the same motions, the federal claims were dismissed along with plaintiffs' ancillary claims, but the plaintiffs' supplementary claims were permitted to remain and Mr. Monsen was permitted to amend and re-plead his ancillary counterclaims. *See,* ORDER (*filed* April 25, 2002), App. C.[2] Plaintiff renewed the motion to dismiss the counterclaims briefing the lack of supplementary jurisdiction. The trial court continued the hearing on the motion until trial and allowed trial on the counterclaims.

By deferring the issue of jurisdiction, the parties sought to create consent jurisdiction in federal court, though there was little question that the ice upon which the federal question was constructed would shatter the moment it was tested. The nexis between the federal claim and the facts in the counterclaims was even more tenuous. The sole common nucleus of operative fact was the mutual anger of two of the parties. The record indicates that the trial court was aware of the jurisdictional problem before it was raised by the parties, and may have raised the issue informally or

---

[2] Defendant concurs in the first footnote to his motion that the trial court would lack jurisdiction once the federal claim was denied. DEFENDANT GORDON MONSON'S MOTION TO DISMISS, at note 1, at 7, JA 83-P.

in chambers. The trial court stated in the Rule 59 Motions argument that it raised the issue of jurisdiction *sua sponte* before the motions of the parties. TR, Motions Proceeding, at 2, ln. 16-25, to 3, ln. 1 (August 30, 2002), JA 270-71. The trial court dismissed plaintiffs' federal claim as soon as it was challenged, and limited plaintiffs' ancillary state claims to those which were justiciable, to wit, that:

"[p]laintiff 'mistreated and ripped off' by selling them retitled out-of-state cars that anything could have happened to and [V]irginia still gives a good clean title for, or charging for work not done as expected or charging for new parts when they were used ... on and on ...' contains factual assertions which are provably false." ORDER, at 10 (April 25, 2002), JA 107, App. C, at § 1.

The language appears in the Complaint at paragraph 28, and is copied – with all punctuation, spelling, and capitalization errors intact – from a specific Internet mailing list posting in which Mr. Monson makes it very clear that this statement is not at all about his personal experiences with plaintiff, but refers to the "many people that peter has mistreated." Complaint, at ¶ 28, at 11, JA 28. The justiciable claim was the generalized claim that he "ripped off" many people, as contrasted with the stale (and probably privileged) claim presented in paragraph 23 of the Complaint about Mr. Monson's car. To prove that his statements on the Internet were true, Mr. Monson introduced testimony from witness Korrie Mapp that was unrelated to Monsen's 1999 contract with Farrell.

Mr. Monson's counterclaims had nothing to do with the operative facts of ¶ 28. The counterclaims all arose from a transaction in 1999 about which he was personally dissatisfied. Mr. Monson counterclaimed that a transaction he had completed with plaintiff on March 12, 1999, about two-and-a-half years earlier, was fraudulent. This, he alleged, constituted his defense of truth to the plaintiff's defamation claims. The problem with this analysis is that the counterclaim and the claim refer to different statements.

Proving that the counterclaim is true is not material to proving that the justiciable defamatory statements were true.

The procedures of the trial court were not as advantageous as plaintiff's friend and then lawyer anticipated. Mr. Duff was timely served and retained counsel, but, after he filed bankruptcy, the action was stayed as to him only until his bankruptcy case was dismissed. Alleged to be the key conspirator, all parties agreed he was essential to the case. TR (First Trial Date Hearing), at 7, ln. 6-22 (April 8, 2002), JA 205. As defendant's counsel acknowledged: "I don't see how this case can make any sense to a jury without John Duff here. We think that he is central to the case, too." *Id.*, at ln. 20-22, JA 205. Mr. Duff remained uncooperative with plaintiff and was compelled to appear at his deposition on plaintiff's motion. ORDER (*filed* January 11, 2002), CIVIL DOCKET, at entry 46, at 8, JA 8. Even after the stay was vacated, ORDER (*filed* February 15, 2002), CIVIL DOCKET, at entry 56, at 9, JA 9, Mr. Duff, who had the cell phone number of defendant's attorney, called him just before trial, TR (First Trial Date Hearing), at 3, ln. 25 to 4, ln. 1 (April 8, 2002), JA 201-02, apparently discussed that there was a warrant out for him, and he remained in hiding at the first trial date.[3] When plaintiff noted that Mr. Duff was essential for trial, the trial court suggested a voluntary dismissal. When defendant agreed, the court immediately pulled its calendar, TR (First Trial Date Hearing), at 7, ln. 6-22 (April 8, 2002), JA 205, *et seq.*, and directed that plaintiff have the burden of re-service. TR (First Trial Date Hearing), at 8, ln. 17-25 (April 8, 2002), JA

---

3 The court instructed Mr. Bell to get trial notice to Mr. Duff, but it is unclear from the record whether that was to be accomplished by service in accordance with Fed.R.Civ.Proc. 5(b)(1), or whether plaintiff was required to serve the fleeing felon with a trial notice of the new trial, even though he had already been served process and had counsel.

206.[4] Mr. Monson sought, and the trial court granted, a continuance with the consent of plaintiffs that Mr. Duff was essential.

At the time of the second trial, Mr. Duff remained missing. While he had been served by posting at his residence, TR, Trial, at 3-4 (June 11, 2002), JA, at 217-217a, court offered a nonsuit as to Mr. Duff, offering no option to continue trial. *Id.* TR, 3-6, JA 217-217c. By the end of the interchange, the trial court concluded that a subpoena had been served, *id.*, at 6-7, JA 217c-217d, but the court proceeded to enter a nonsuit depriving plaintiff of an essential party witness who was the key conspirator, who had been served, and who had fled the jurisdiction – even though he had been in contact with defendant's counsel before he failed to appear., TR (First Trial Date Hearing), at 3-9, ln. 25 (April 8, 2002), JA 217-217f. Mr. Duff resurfaced immediately after the trial ended.

Once the trial had been continued, the trial judge

---

[4] At the start of this colloquy, defendant's attorney had been called on his cell phone by the missing witness on Friday night, TR (First Trial Date Hearing), at 3, ln. 25 (April 8, 2002), JA 201-02, and they arranged to meet "last evening," presumably, April 7. *Id,* at 4, ln. 1. They must have met the evening before trial, because they had a substantive discussion, *id.*, at 4-5, JA 202-03. The missing witness apparently knew of the trial, since he planned to be there, *id.*; and he gave his address to defendant's counsel the night before. *Id.*, at 8, ln 17-25, JA 206. Nevertheless, the trial court persisted in asking whether there had been formal notice of the trial date to this admittedly served and recalcitrant witness, *id.*, at 6, and the trial court proposed to dismiss him "voluntarily" until defendant's counsel agreed that he was an essential witness. Once the court placed the duty on plaintiff to re-serve the witness whom defendant had met the night before, defendant's counsel no longer had his address, but merely had the name and address of Mr. Duff's criminal lawyer – a person bound by attorney-client privilege from providing the information to plaintiffs. *Id.*, at 9, ln. 2-11, JA 207. Further, while plaintiff's trial counsel agreed that Mr. Duff's attorney had withdrawn, there is no entry of record, and both parties agree that Mr. Duff's counsel did not withdraw at the off-the-record pre-trial, *id.*, at 5, so the secret withdrawal order could not have been issued there.

refashioned the case, granting the motion to dismiss the federal counts and permitting the counterclaims to be amended, and re-opening discovery to permit newly pled state claims counterclaims to be tried. ORDER, at CIVIL DOCKET, entry 87, at 11 (April 25, 2002), JA 11. Without Mr. Duff, however, plaintiff's case ceased being a conspiracy led by a disaffected ex-employee embezzler in combination with a competing performance tuner and became little more than a repairman suing his former customer for libel.

Mr. Monson's expert testified that his compensatory damages would be about $7,000, and the jury returned with a trebled award of $5,000 in compensatory damages for violation of the VCPA. The court rounded the matter out by awarding $55,000 worth of attorneys' fees for the services of two lawyers. Judgment was entered for defendant and against plaintiff in the amount of over $91,000 to deter Messrs. Farrell and Bell the next time they consider bringing a defamation case into the federal court.

Appeal was timely noted. There were no cross-appeals. The court of appeals held that appellate courts apply an abuse of discretion standard to review all trial court decisions on supplementary jurisdiction under 28 U.S.C. § 1367. "We review a district court's actions under § 1367 for abuse of discretion. *Shanaghan v. Cahill*, 58 F.3d 106, 109 (4th Cir. 1995)." *Farrell v. Monsen*, slip op., at 5 (December 3, 2003). The court of appeals declined to follow a careful distinction it had made in its prior decision in *Shanaghan v. Cahill*, 58 F.3d 106, 112 (4th Cir. 1995), between using an abuse of discretion standard for the issue of retaining jurisdiction once subject matter jurisdiction has already been established and a *de novo* review of the issue of whether a supplementary claim is within the ambit of 28 U.S.C. § 1367(a) under *Sue & Sam Manufacturing Co. v. B-L-S Construction Co.*, 538 F.2d 1048 (4th Cir. 1976) and *Painter v. Harvey*, 863 F.2d 329 (4th Cir. 1988). The court of appeals performed no substantial review of the applicable standards and elucidated no requirement for the trial court to have

subject matter jurisdiction before it determines whether to retain jurisdiction over supplementary claims.

In the present case, all parties conceded below that there was no basis for the federal claim. Indeed, Mr. Farrell withdrew to a safe harbor by dismissing the federal complaint when two other defendants issued demands under Rule 11. *See,* note 17, *infra.* Mr. Monsen's counsel, in the court below, asked that it be dismissed as baseless, acknowledging that all of the other claims would fail for want of jurisdiction once the federal claim was dismissed. DEFENDANT GORDON MONSEN'S MOTION TO DISMISS, at n. 1, at 7, JA 214. The trial court took credit for identifying the federal claim as baseless *sua sponte*. TR (Hearing), at 2, ln. 16-25, to 3, ln. 1 (August 30, 2002), JA 270-71. The appeals court acknowledges that the federal claim may have been what it called a sham. *Farrell v. Monsen*, slip op., at note 4, at 5, App. A-6. Nevertheless, nothing in the appellate Opinion analyzes the antecedent question of whether the trial court ever had jurisdiction. The Fourth Circuit would allow jurisdiction – even where the plaintiff acknowledges that the federal count below was a sham – by permitting a trial court to find and then retain federal jurisdiction in any case in which a federal statute is asserted in the complaint, even if the pled federal cause of action is invalid on its face and subsequently withdrawn.

After viewing "Farrell's post-trial actions as those of a somewhat sore loser who is upset that his chosen forum rendered an unfavorable verdict," *Farrell v. Monsen*, slip op., at 7, App. A-8, the Fourth Circuit bootstrapped supplementary jurisdiction without a determination as to whether there ever was federal question jurisdiction, and, like the trial court, explored the avenue created in *Atlas Global Group, L.P. v. Grupo Dataflux*, 312 F.3d 168, 169-70 (5th Cir. 2002), asking whether previously unpled diversity jurisdiction might be used as a basis for the raw exercise of supplementary jurisdiction.

REASONS FOR GRANTING THE PETITION

I. This case should be consolidated with *Grupo* so this Court can explain the limitations, if any, of retroactive assertions of jurisdiction.

The present case follows on a thread of cases expanding this Court's decision in *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996), and limiting this Court's decision in *Steel Co. v. Citizens for A Better Environment*, 523 U.S. 83 (1998), to create a gateway to massive expansion of federal court jurisdiction. Like the *Grupo* case, currently taken under advisement by the Court, this case is an example of a bootstrapped argument which inverts the rule in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), that the courts cannot be ousted from jurisdiction by permitting courts to acquire jurisdiction retroactively through the behavior of the parties.

The Fourth Circuit rule limits the standard of review of supplementary jurisdiction to an abuse standard, and it permits trial courts to retain subject matter jurisdiction on little more than plaintiff's pleadings. That is far more dangerous to principles of federalism than the same "sore loser" argument in a diversity case. In a diversity matter, the residence of the parties can be manipulated or manufactured after the litigation begins. In federal question matters, the manipulation requires no more than a plaintiff asserting the jurisdiction of the court and the defendant delaying its Rule 11 warning letter until some safe harbor point in the litigation.[5]

As in *Grupo Dataflux*, the respondent here relies upon the behavior of the parties in manufacturing or manipulating subject matter jurisdiction after the case is filed. "[A] court's subject-matter jurisdiction cannot be

---

[5] The mechanism of this manipulation, and an answer to Mr. Justice Stephens' oral question at the end of the Grupo argument as to why parties and their counsel would be motivated – or, even, required – to manipulate jurisdiction if these rules are adopted, is included in subsection IV of this section, *infra* at 27 & n. 22.

expanded to account for the parties' litigation conduct...." *Kontrick v. Ryan*, 2004 U.S. LEXIS 663, at 26 (Jan. 14, 2004).[6] Longstanding precedent establishes that even *after* judgment has been entered, the losing party still can raise jurisdiction at any time and may do so in the Supreme Court in the first instance. *Id.* at 24 (citing *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126, 127 (1804)). The Fourth Circuit would permit the losing party to raise jurisdiction at any time, but, absent an abuse greater than the scam acknowledged in this case, would perform no substantive review of the absence of initial pleadings of jurisdiction.

A. Whether the trial court lacked subject matter jurisdiction over the counterclaims because the counterclaims fail to arise from a common nucleus of operative facts as the Federal claim, and whether the appeals court correctly applied an abuse of discretion standard to 28 U.S.C. § 1367(a).

As a prerequisite to the question of whether the trial

---

[6] If this Court applies a rule based on the time of raising the defense of lack of jurisdiction, as well as or rather than a rule based solely on whether jurisdiction was plausible at time of filing, this case is more like *Saadeh* and less like *Grupo Dataflux*. In *Saadeh*, as in *Farrell*, the motion to dismiss both the federal claim and these counterclaims for want of jurisdiction was raised prior to the conclusion of discovery. In *Grupo Dataflux*, the motion to dismiss was first raised after trial. In oral argument on *Grupo Dataflux* in this Court, the Chief Justice and Mr. Justices Stevens, Scalia, Kennedy, and Breyer seemed to ask questions focusing on the time the issue of jurisdiction was first raised. Alternatively, under the bright-line rule applied by the D.C. Circuit in *Saadeh*, the exact time at which the jurisdictional defect was raised is immaterial. If the jurisdictional defect exists at the commencement of litigation, that defect must be acted on no matter when it is recognized. *See Kontrick*, 2004 U.S. LEXIS 663, at 24. The *Farrell* jurisdictional defect was so obvious that the trial court raised it *sua sponte*, two of the defendants raised it in a Rule 11 warning letter and were voluntarily dismissed, *see* note 17, *infra*, and crossing motions to dismiss were filed in which even the respondent agreed that these counterclaims would have to be dismissed if the federal dismissal was granted. *See*, DEFENDANT GORDON MONSON'S MOTION TO DISMISS, at n. 1, at 7, JA 83-P.

court should have exercised its discretion in retaining jurisdiction over the counterclaims, the court must first have correctly concluded that it had subject matter jurisdiction over them. "The question of whether a court has the power to hear claims arising under pendent jurisdiction is an issue precedent to and distinct from the second question – whether the Court, in its discretion, should exercise that power." *Mason v. Richmond Motor Co., Inc.*, 625 F.Supp. 883, 885 (E.D. VA. 1986), *aff'd* 825 F. 2d 407 (4th Cir. 1987).

> "Thus, the analysis a court must follow in determining whether to hear pendent State claims is two-fold: First, the court must determine whether it has the jurisdiction, *i.e.*, the power to hear the claim; second, the court must determine whether in its discretion it should hear pendent State claims which it in law has the power to hear," *Id.*

Before the analysis of federal jurisdiction was first brought to the court's attention, the trial court suspected it lacked jurisdiction, and it raised the issue *sua sponte*. TR (Hearing), at 2, ln. 16-25, to 3, ln. 1 (August 30, 2002), JA 270-71. The federal count was immediately dismissed and the case limited to its state counts. ORDER (April 25, 2002), JA 97. There was nothing to which the state claims were supplementary, and even the defendant, in his motion to dismiss, acknowledged that there would be nothing left of the case once the federal counts disappeared. DEFENDANT GORDON MONSON'S MOTION TO DISMISS, at n. 1, at 7, JA, at 214.

Even if one assumes, *arguendo*, that the federal court obtained jurisdiction during the brief time when any reasonable person should have thought the federal claims were valid, the counterclaims were not supplementary to the plaintiff's claims. The analysis of whether the state claims were properly supplementary turns on "whether or not they arose 'out of the transaction or occurrence that is the subject matter of the opposing party's claim.' FRCP 13(a)(b)." *Sue & Sam Manufacturing Co. v. B-L-S Construction*

Co., 538 F.2d 1048 (4th Cir. 1976). "The facts which operate to give rise to the federal claim must be facts which give rise to the State claim." *Mason v. Richmond Motor Co., Inc.*, 625 F.Supp. 883, 885 (E.D. VA. 1986), 625 F.Supp. 883, 887 (E.D. VA. 1986), *aff'd* 825 F. 2d 407 (4th Cir. 1987). In the present case, plaintiff has consistently challenged the jurisdiction of the trial court over the counterclaims. Even before the weak Lanham Act claim was dismissed, plaintiffs properly asserted that the counterclaims were unrelated to the operative nucleus of facts of the federal claim or the pendent state claims.[7]

The trial court limited the claims that could be proven by plaintiff. MEMORANDUM OPINION, at 10 (April 25, 2002), JA 107. Though the trial court read it incorrectly to the Jury once, TR Trial, at 584, ln. 18-20 (June 12, 2001), JA 239. the corrected instruction was limited to statements defendant had putatively made to defame Mr. Farrell in his global treatment of customers. TR (Trial) at 625, ln. 8 to 626, ln. 3, JA 249-50.

In the *Sue & Sam Manufacturing Co*, case, the Court reviewed the law and applied four different tests to the facts. The relationship between defendant's counterclaims and the federal claim fails each of the four tests.

"1. Are the issues of fact and law raised by the claim of [plaintiff] and the counterclaims of [defendant] largely the same?" *Sue & Sam Manufacturing Co. v. B-L-S Construction Co.*, 538 F.2d 1048, 1051 (4th Cir. 1976). In plaintiffs' claim, defendant is claimed to have made the following defamatory statements:

"(a) that the plaintiffs "mistreated and ripped off" customers "by selling them retitled out-of-state cars that

---

[7] Plaintiffs initially included claimed defamatory statements about Mr. Monson's car upgrade. *See*, COMPLAINT, at ¶ 23, JA 27. These claims, which are also unrelated to the nucleus of operative facts of how Mr. Monson's car was repaired in early 1999, were excluded by the trial court from plaintiffs' case, but permitted to go to trial with different witnesses, exhibits, and a different operative core of facts in defendant's case.

> anything could have happened to and Virginia still gives a good clean title for, or charging for work not done as expected or charging for new parts when they were used...on and on... (b) that there is no such thing as 'pfs pmc.'"

TR, Trial, at 625, ln. 10-17 (June 13, 2001), JA 249. The statements have nothing to do with the putatively poor automotive upgrade job. They lack a commonality of dates. The upgrade occurred in 1999. The witnesses called about Mr. Monsen's car were a competing automotive repair specialist and Korrie Mapp and are not the witnesses called regarding the defamation. The documents introduced regarding the defamation are a completely different set of documents than anything designed to prove anything about clean titles, out-of-state cars, or charging for work not done or new parts when they were used. Unlike *Painter v. Harvey*, 863 F.2d 329, 332 (4th Cir. 1988), this is not a matter of "what transpired during" one event in one place and time. The times, dates, and evidence are all different; only the plaintiff and defendant are in common, and that is only because the trial court cut everyone else out of the case before trial.

As in the cited case, there is no identity between the claims. The court took significant evidence, including testimony, documentary evidence, and tangible evidence that Mr. Monsen's car was repaired poorly. The jury ultimately rendered a verdict on whether the repair was performed poorly. None of this evidence had any bearing on whether plaintiff was feral; whether he sold salvage cars; or whether there was a PFS computer. Unlike the case of *Painter v. Harvey*, 863 F.2d 329 (4th Cir. 1988), where the adjudication of a counterclaim of libel would require adjudication of the truth of the claim of excessive force – since both arose out of the activities in the same squad car – the present case is akin to *Sue & Sam Manufacturing Co. v. B-L-S Construction Co.*, 538 F.2d 1048 (4th Cir. 1976).

"2. Would *res judicata* bar a subsequent suit on Lee's counterclaims, absent the compulsory counterclaim rule?"

Sue & Sam Manufacturing Co. v. B-L-S Construction Co., 538 F.2d 1048, 1052 (4th Cir. 1976). Unless the counterclaims were mandatory, as provided in FED.R.CIV.PROC. 13(a), rather than permissive, as provided by FED.R.CIV.PROC. 13(b), the trial court lacked jurisdiction over them *ab initio*.

> "But FRCP 13(a) and (b) are subject to the qualification that a permissive counterclaim must have an independent jurisdictional base, while a compulsory counterclaim need not have. The leading text writers and the cases are in agreement and are consistent on this point. Federal Practice and Procedure, Wright and Miller, Vol. 6, §§ 1414, 1422 (hereafter Wright and Miller); Moore's, p. 13-379 et seq, p. 13-481. The jurisdiction of the court as to a compulsory counterclaim is ancillary jurisdiction. Wright and Miller, § 1422; Moore's, p. 13-379. While these text writers may be somewhat critical of the requirement of an independent jurisdictional base in the case of a permissive counterclaim, as perhaps in conflict with the general policy of the federal courts to dispose of all the litigation at hand in a single suit for the sake of efficiency and economy, they nevertheless are in agreement that the cases are uniform in requiring a separate jurisdictional base for permissive counterclaims. And Wright and Miller, § 1414, calls attention to FRCP 82, which provides that the federal rules do not 'extend or limit the jurisdiction of the United States district courts.' *Sue & Sam Manufacturing Co. v. B-L-S Construction Co.*, 538 F.2d 1048, 1051 (4th Cir. 1976).

The difference between a permissive counterclaim and a mandatory counterclaim is not difficult:

> "FRCP 13(a) requires the assertion of a compulsory counterclaim against any opposing party if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim, while FRCP 13(b) permits the filing of a counterclaim against an opposing party

not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim." *Id.*

Again, the counterclaims fail the test. An adjudication of whether defendant was telling the truth when he, for example, claimed that the PFS PMC computer sold by plaintiff to the public would have no preclusive effect on a factual finding of whether plaintiff exchanged the engine core without permission in 1999.

"3. Will substantially the same evidence support or refute B-L-S's claim as well as Lee's counterclaim?" *Sue & Sam Manufacturing Co. v. B-L-S Construction Co.*, 538 F.2d 1048, 1052 (4th Cir. 1976). Again, the counterclaims fail the test. An entirely different body of evidence supported the claim than the counterclaim. For the claim, plaintiffs introduced Mr. Farrell, co-defendant Mr. Penner, and prints of the offensive documents. Defendant introduced Mr. Monsen. For the counterclaim, Mr. Monsen introduced an expert witness about the subsequent repair to his vehicle named Mr. Barninger, a fact witness named Mr. Korrie Mapp, and invoices of the work done. While the division is not pristine, to a large extent, on June 11, the court took evidence on the plaintiffs' state claims,[8] and, on June 12, the court took evidence of defendant's counterclaims. In contrast, in *Painter v. Harvey*, 863 F.2d 329 (4th Cir. 1988), which facial appears similar because it presents a libel defense of truth as arising from the same nucleus of operative facts, almost all of the witnesses gave testimony

---

[8] The trial court stretched the rules of evidence to permit defendant's hearsay evidence in the form of letters from persons who complained they had been offered prior salvage titled cars. The defendant needed to get that evidence in to show the elements of truth and privilege in defense of the libel claim, but the trial court allowed the evidence, over objection, to show the mental state of defendant – presumably his mental state to tell the truth and not to engage in malice. TR Trial, at 631, ln. 24 to 633, ln.5 (June 13, 2002), JA 255-57. This body of evidence was part of defendant's case material to the plaintiffs' state claims. This evidence has nothing to do with defendant's counterclaims.

on one issue – what happened in the back of the police car. In the present case, only the parties were able to address both the plaintiffs' issues and the defendant's issues. The only identity between the cases is an identity of parties.

"4. Is there any logical relation between B-L-S's claim and Lee's counterclaims?" *Sue & Sam Manufacturing Co. v. B-L-S Construction Co.*, 538 F.2d 1048, 1053 (4th Cir. 1976). Again, there is no logical relationship between the plaintiffs' state claims and the defendant's counterclaims, other than the identity and hatred between Mr. Monsen and Mr. Farrell. The damages are dissimilar and arise in different ways, unlike rain coming at two different times between the same roof joinder. *Id.*, at 1053. There is no similarity, as in *Sue & Sam*, where: "The claims arose at the same time, and the occurrence which occasioned both the claim of Sue & Sam against B-L-S and the third party claim of B-L-S against Lee was the fact that B-L-S had negligently allowed the water to enter the building." *Id.* There is no connection such that the truth of one statement acts as a defense to the other claim, because the claims are unrelated. *Painter v. Harvey*, 863 F.2d 329, 332 (4th Cir. 1988).

B. Whether the trial court abused its discretion by failing to dismiss the counterclaims once it dismissed the federal claim after *sua sponte* raising the issue of jurisdiction *ab initio*.

There is no question that the trial court had the discretion to dismiss the state claims once it dismissed the Lanham Act Federal claims under either the supplementary jurisdiction statute, 28 U.S.C. § 1367(c),[9] or under *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726-727

---

[9] The Act provides four grounds for declining to exercise supplementary jurisdiction, including, to wit: "(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining the jurisdiction." 28 U.S.C. § 1367(c)(2-4).

(1966).[10] The question is whether the trial court lacked discretion or abused its discretion in failing to dismiss these claims. While some circuits seem to hold that declining to dismiss a case and retaining supplementary jurisdiction is not jurisdictional and can only be reviewed as an abuse of discretion, *Kansas Pub. Employees Retirement Sys. V. Reimer & Koger, Inc.*, 77 F.3d 1063, 1067-68 (8th Cir. 1996), others note that, because the decision is jurisdictional, the appellate court is obligated to raise the issue even if it is not raised by the parties. *Maguire v. Marquette University*, 814 F.2d 1213, 1218 n. 4 (7th Cir. 1987). Even where courts have noted that the issue cannot be both discretionary and jurisdictional, the court noted that a federal court has no power to hear a case outside its jurisdiction. *LaShawn A. v. Berry*, 87 F.3d 1389, 1396-97 (D.C. Cir. 1996).

In the present case, the assertion of a federal claim lacked serious merit. The lack of merit was sufficiently

---

[10] The *Gibbs* case provided an additional grounds relevant here, to wit, whether separation of the state and federal claims is justified by reasons independent of jurisdictional considerations, such as the likelihood of jury confusion. *United Mine Workers of America v. Gibbs*, 383 U.S. at 726-27. While this factor does not appear explicitly in the statute, it would seem to be subsumed under the fourth criterion of 28 U.S.C. § 1367(c)(4). Several circuits appear to have held that the statute merely codifies the case. *See, Rodriguez v. Doral Mortgage Corp.*, 57 F.3d 1168, 1177 (1st Cir. 1995) [trial court has access to "totality of the attendant circumstances"]; *Borough of W. Mifflin v. Lancaster*, 45 F.3d 780, 788 (3d Cir. 1995); *Brazinski v. Amoco Petroleum Additives Co.*, 6 F.3d 1176, 1182 (7th Cir. 1993); *Diven v. Amalgamated Transit Union & Local 689*, 38 F.3d 598, 600-01 (D.C. Cir. 1994). Other circuits have held that the statute limits the discretionary analysis of the case law. *Itar-Tass Russian News Agency v. Russian Kurier*, 140 F.3d 442, 445-448 (2d Cir. 1998); *Doe v. Norwest Bank Minn., N.A.*, 909 F.Supp. 668, 673-74 (D.Minn. 1995), *aff'd on other grounds*, 107 F.3d 1297 (8th Cir. 1997); *Executive Software N. Am., Inc. v. U.S. District Court*, 24 F.3d 1545, 1552-1555, 1556 (9th Cir. 1994); *LaSorella v. Penrose St. Francis Healthcare Sys.*, 818 F.Supp. 1413, 1415-16 (D.Coro. 1993) [noting that the increase in federal supplementary jurisdiction coincides with the statute since it eliminates two *Gibbs* factors and makes jurisdiction mandatory]; *Palmer v. Hospital Auth.*, 22 F.3d 1559, 1569 (11th Cir. 1994). *See*, 16 MOORE'S FEDERAL PRACTICE, Supplementary Jurisdiction § 106.60[1].

obvious that the trial court raised the issue *sua sponte* and dismissed the federal count based on the motion first raised. The dismissal of the meritless federal count occurred at the same time that the trial court first permitted substantive amendment of the counterclaim, and it re-opened discovery for the counterclaim. Further, the trial court allowed the state claims to proceed after it required re-service upon the central co-conspirator and then dismissed him from the case leaving nothing except the unrelated state claims. If this is not an abuse of discretion, it would be difficult to posit a fact setting to distinguish discretion from unfettered fiat. That was an abuse of discretion.

As a policy matter, the failure to dismiss the state claims ought be treated as more than a discretionary matter, following the Seventh Circuit. The parties – and, most clearly, the court – were each aware of the want of jurisdiction, but proceeded for their own reasons in defiance of that jurisdiction.[11] While stipulations and litigation agreements of parties are – and ought be –respected in most instances, the Supreme Court has taught that this cannot be applicable to jurisdiction, because the federal courts are courts of limited jurisdiction and have a continuing duty at all levels to prevent misuse of that jurisdiction. If federal jurisdiction can be abused this easily, that mandate is meaningless.

C. Whether, as held by the trial court and not rejected by the court of appeals, the diversity of the final two defendants can rescue subject matter jurisdiction where there were diverse parties at the time the case was filed.

---

[11] The court sought to punish plaintiff for bringing weak state claims and a non-existent federal claim to a court that prides itself on speed. A punishment might have been available under FED.R.CIV.PROC. 11, as two other defendants followed, but the remaining defendant preferred to assert his own state claims.

After trial was over,[12] after the court had dismissed the claims against the non-diverse parties, after one party settled, and after the court nonsuited another, the court asked: "Let me ask you this. What about the fact that there's diversity in this case?" TR (Motion, August 30, 2002), at 3, ln. 19-21, JA 272. The trial court concluded that there was diversity. TR (Motion, August 30, 2002), at 21, ln. 12-16, JA 289; *see* ORDER (Sept. 5, 2002), App. B, at 6-7.[13] On the date it was filed – and thereafter – the Complaint named multiple parties from Virginia, *See*, COMPLAINT, at 1, JA 18. They remain defendants herein, APPELLANT'S BRIEF, at 1, *supra*. The date for determination of diversity is the date on which the complaint is filed. *Rowland v. Patterson*, 882 F2d 97, 98 (4th Cir. 1989). Like the court in *Grupo Dataflex*, the trial court was looking for a retroactive excuse for its own jurisdiction.

II. The case should be reviewed to resolve a split in the circuits over whether jurisdiction can be resolved retroactively from time of judgment.

In *Saadeh v. Farouki*, 107 F.3d 52 (D.C. Cir. 1997), the D.C. Circuit expressly refused to expand *Caterpillar* and *Newman-Green* beyond their contexts to allow a party to retroactively create diversity jurisdiction by unilaterally changing its citizenship after suit is filed. *Saadeh*, 107 F.3d at 56-57. In *Atlas Global Group, L.P. v. Grupo Dataflux*, 312 F.3d 168, 169-70 (5th Cir. 2002), the Fifth Circuit declined to follow *Saadeh*,

---

[12] Actually, the trial court appears to have first sought to resuscitate jurisdiction by introducing diversity of citizenship after the Jury had retired to deliberate. During trial, the trial court understood that jurisdiction is measured at the time of filing. TR, Trial, at 611, ln. 3-13 (June 13, 2001), JA 247.

[13] More precisely, it would appear that the trial court had already concluded that the court lacked jurisdiction when it said: "Well, jurisdiction can be raised at any time, even on appeal," TR (Motions Hearing August 30, 2002), at 8, ln. 23-24, JA 276, and then sought to explore the issue further with defendant's counsel before hitting upon the notion of the applicability of diversity jurisdiction.

summarily rejecting the D.C. Circuit's holding as "unpersuasive." *Atlas Global Group, L.P.*, 312 F.3d at 173. [14] This creates a split in the Circuits when a federal court seeks to justify jurisdiction which did not exist at the time of filing. The Eastern District of Virginia followed the Fifth Circuit rule in determining that diversity jurisdiction arose after filing but before judgment when the issue was raised to the court on motions to dismiss during discovery. The Fourth Circuit upheld the trial court's alternative basis for jurisdiction and did not reverse the trial court's conclusion on diversity. The trial court conclusion is inconsistent with the language of the D.C. Circuit:

---

[14] Unlike the panel majority's decision in this case, the D.C. Circuit's decision in *Saadeh* is consistent with longstanding precedent holding that a party's unilateral change in citizenship after litigation has commenced cannot retroactively create diversity jurisdiction that did not exist at the time suit was filed. *See Goldsmith v. Mayor & City Council of Baltimore*, 845 F.2d 61, 62 n.1 (4th Cir. 1988) (affirming dismissal of claim where party sought to retroactively create diversity jurisdiction based on party's unilateral change in citizenship after suit was filed); *Lyons v. Weltmer*, 174 F.2d 473 (4th Cir. 1949) (per curiam) (same); *Oh v. Ford Motor Co.*, 79 F. Supp. 2d 1375, 1377-78 (N.D. Ga. 1999) (granting motion to remand where diversity jurisdiction was based on defendant's change in citizenship after suit was filed); *Gard v. Teletronics Pacing Sys., Inc.*, 859 F. Supp. 1349, 1354-55 (D. Colo. 1994) (rejecting diversity jurisdiction as an alternative basis for subject matter jurisdiction over party's claims based on party's change in citizenship after suit was filed); *Russell v. Harrison*, 562 F. Supp. 467, 471 (N.D. Miss. 1983) (same); *Lang v. Windsor Mount Joy Mut. Ins. Co.*, 487 F. Supp. 1303, 1306-07 (E.D. Pa. 1980) (granting motion to dismiss where diversity jurisdiction was based on plaintiff's change in citizenship after suit was filed); *Hagen v. Payne*, 222 F. Supp. 548, 553 (W.D. Ark. 1963) (granting motion to remand where diversity jurisdiction was based on defendant's change in citizenship after suit was filed); *see also Field v. Volkswagenwerk AG*, 626 F.2d 293, 304 (3d Cir. 1980) ("Thus, if diversity of citizenship did not exist at the time the action was filed, it cannot be created retroactively by a subsequent change of domicile by one of the parties"); *Slaughter v. Toye Bros. Yellow Cab Co.*, 359 F.2d 954, 956 (5th Cir. 1966) ("It seems to be without question that a change of citizenship occurring after the commencement of the action would not affect jurisdiction or the absence of it") (citation omitted).

> "Although we are mindful of the 'considerations of finality, efficiency and economy' that concerned the Supreme Court in *Caterpillar*, those concerns in the removal context are insufficient to warrant a departure here from the bright-line rule that citizenship and domicile must be determined as of the time a complaint is filed." *Saadeh*, 107 F.3d at 56-57.

III. The case should be reviewed to resolve a dispute in the circuits over the proper standard of review where supplementary jurisdiction is asserted and retained after the dismissal of the federal jurisdictional basis.

There is a split in the Circuits over whether the discretion vested in a district court is the discretion to decline to exercise supplemental jurisdiction or whether the discretion extends to retaining cases without substantive review of the initial claim of subject matter jurisdiction. In *Patten v. Foley's*, 66 Fed. Appx. 188, 2003 U.S. App. LEXIS 11383, 9-10 (10th Cir. filed June 6, 2003), the appeals court concluded that the "district court did not abuse its discretion in declining supplemental jurisdiction after it dismissed all of the claims over which it had original jurisdiction. *See* 28 U.S.C. § 1367(c)(3) (permitting a district court to decline to exercise supplemental jurisdiction if the court has dismissed all claims over which it had original jurisdiction)." *Id.* The 11th Circuit has held that even the discretion to decline supplemental jurisdiction is conditioned on a jurisdictional power to exercise that jurisdiction: "We have held that, once a district court determines 'that it has power to exercise supplemental jurisdiction under § 1367(a), then the court should exercise that jurisdiction, unless § 1367(b) or (c) applies to limit the exercise.' *Baggett v. First Nat'l Bank of Gainesville*, 117 F.3d 1342, 1352 (11th Cir.1997)." *Milan Express, Inc. v. Averitt Express, Inc.*, 208 F.3d 975, 2000 U.S. App. LEXIS 6446, 12, 46 Fed. R. Serv. 3d (Callaghan) 895 (11th Cir. 2000), *later appeal* 254 F.3d 966, 2001 U.S. App. LEXIS 13734 (11th Cir. 2001) [reversing supplemental jurisdiction count]. The review of

the existence of initial subject matter jurisdiction and the supplemental jurisdiction pendent on it is *de novo* in the Third Circuit, *Bonenberger v. Plymouth Township*, 132 F.3d 20, 1997 U.S. App. LEXIS 35507, 4, 77 Fair Empl. Prac. Cas. (BNA) 1242, 72 Empl. Prac. Dec. (CCH) P45,083 (3d Cir. 1997), but appears to be open-ended and discretionary in the Ninth Circuit: "A district court's decision whether to retain jurisdiction over supplemental claims once the original federal claims have been dismissed is reviewed for abuse of discretion. *Brown v. Lucky Stores, Inc.*, 246 F.3d 1182, 1187 (9th Cir. 2001)." *Tritchler v. Poole*, 2004 U.S. App. LEXIS 2593, 3, 93 Fair Empl. Prac. Cas. (BNA) 378 (9th Cir. *filed* February 18, 2004). The First Circuit applies a rule that the dismissed initial federal question claims not be "sufficiently devoid of merit to vitiate federal subject matter jurisdiction over [plaintiff's] state law claims on appeal. *See Pejepscot Indus. Park, Inc. v. Maine Cent. R.R. Co.*, 215 F.3d 195, 200 (1st Cir. 2000) (noting that standard of review for supplemental jurisdiction determinations is abuse of discretion)." *Hatch v. Town of Middletown*, 311 F.3d 83, 2002 U.S. App. LEXIS 23747, at note 2, at 3 (1st Cir. 2002).

The question for this Court is whether plaintiffs can manufacture supplemental jurisdiction merely by pleading a federal cause and dismissing prior to trial.

IV. The case should be reviewed to fashion a policy that does not favor or require attorneys to represent their clients zealously by pleading and then retreating from federal question jurisdiction in order to manufacture supplementary jurisdiction.

The court of appeals applies an abuse of discretion standard to review all trial court decisions on supplementary jurisdiction under 28 U.S.C. § 1367. "We review a district court's actions under § 1367 for abuse of discretion. [*citing*] *Shanaghan v. Cahill*, 58 F.3d 106, 109 (4th Cir. 1995)." *Farrell v. Monsen*, slip op., at 5, App. A-6. Under the Fourth Circuit's prior decision in *Shanaghan v. Cahill*, 58 F.3d 106, 112 (4th Cir. 1995), the court applies an abuse of

discretion standard on the issue of retaining jurisdiction once subject matter jurisdiction has already been established. The Court reviews *de novo* the issue of whether a supplementary claim is within the ambit of 28 U.S.C. § 1367 using the standards set forth in *Sue & Sam Manufacturing Co. v. B-L-S Construction Co.*, 538 F.2d 1048 (4th Cir. 1976) and *Painter v. Harvey*, 863 F.2d 329 (4th Cir. 1988). The decision refers to *Sue & Sam* and *Painter*, but defers to the trial court in weighing whether two separate transactions between the same parties were sufficiently similar under the standard set forth in *Sue & Sam*.[15] The court of appeals performed no substantial review of the applicable standards and elucidated no requirement for the trial court to have subject matter jurisdiction before it determines whether to retain jurisdiction over supplementary claims. Rather, the Court applies an abuse of discretion standard in weighing whether the Court has supplemental jurisdiction.

This analysis is parallel to the form of analysis condemned by the Supreme Court in 1998 in *Steel Co. v.*

---

[15] In *Sue & Sam*, the appeals court reviewed a setting in which there were two transactions arising from water or snow damage caused by incorrect design and incorrect construction of a building by the same parties. The court rejected the notion of equating a series of transactions merely because the case involves common parties and an on-going business relationship. *See, Sue & Sam Manufacturing Co. v. B-L-S Construction Co.*, 538 F.2d 1048 (4th Cir. 1976). Unlike *Painter v. Harvey*, 863 F.2d 329, 332 (4th Cir. 1988), this is not a matter of "what transpired during" one event in one place and time. The times, dates, and evidence are all different; only the plaintiff and defendant are in common, and that is only because the trial court cut everyone else out of the case before trial. The briefs of the parties each addressed the *Sue & Sam* factors, and appellant compiled the argument of counsel into a chart that was accepted as part of the record at argument. The appeals court reduced the well-reasoned, four-step rule of *Sue & Sam* to the single statement that: "There is a logical relationship between the claims because they 'essentially ar[o]se from the souring of [the parties'] business relationship.' [citing] *Banner Indus. of N.Y., Inc. v. Sansom*, 830 F.Supp. 325, 328 (S.D. W. Va. 1993)." *Farrell*, slip op., at 8, App. A-10.

Citizens for A Better Environment, 523 U.S. 83 (1998). There, this Court criticized the Circuits for creating a form of hypothetical jurisdiction without first confronting the antecedent issue of whether jurisdiction ever existed. This Court instructs that a well-stated federal claim might form the basis for jurisdiction even if it ultimately fails:

> "It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, i.e., the courts' statutory or constitutional power to adjudicate the case. *See generally* 5A C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE SECTION 1350, p. 196, n. 8 and cases cited (2d ed. 1990). As we stated in *Bell v. Hood*, 327 U.S. 678, 682 (1946), '[j]urisdiction ... is not defeated ... by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover.' Rather, the District Court has jurisdiction if 'the right of petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another,' *id.*, at 685, unless the claim 'clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.' *Id.*, at 682-683; see also *Bray v. Alexandria Women's Health Clinic*, 506 U. S. 263, 285 (1993); *The Fair v. Kohler Die & Specialty Co.*, 228 U. S. 22, 25 (1913). Dismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy.' *Oneida Indian Nation of N. Y. v. County of Oneida*, 414 U. S. 661, 666 (1974); *see also Romero v. International Terminal Operating Co.*, 358 U. S. 354, 359 (1959)." *Steel Co. v. Citizens for A Better Environment*, at Lexis Note 32.

In the present case, all parties conceded below that there was no basis for the federal claim. Indeed, Mr. Farrell withdrew to a safe harbor by dismissing the federal complaint when two other defendants issued demands under Rule 11. *See*, footnote 17, *infra*. Mr. Monsen's counsel, in the court below, asked that it be dismissed as baseless, acknowledging that all of the other claims would fail for want of jurisdiction once the federal claim was dismissed. DEFENDANT GORDON MONSEN'S MOTION TO DISMISS, at n. 1, at 7, JA 214. The trial court took credit for identifying the federal claim as baseless *sua sponte*. TR (Hearing), at 2, ln. 16-25, to 3, ln. 1 (August 30, 2002), JA 270-71. The court of appeals acknowledges that the federal claim may have been what it called a sham. *Farrell v. Monsen*, slip op., at note 4, at 5, App. A-7. Nevertheless, nothing in the Fourth Circuit Opinion analyzes the antecedent question of whether the trial court ever had jurisdiction.

> "While some of the above cases must be acknowledged to have diluted the absolute purity of the rule that Article III jurisdiction is always an antecedent question, none of them even approaches approval of a doctrine of 'hypothetical jurisdiction' that enables a court to resolve contested questions of law when its jurisdiction is in doubt. Hypothetical jurisdiction produces nothing more than a hypothetical judgment – which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning. *Muskrat v. United States*, 219 U. S. 346, 362 (1911); *Hayburn's Case*, 2 Dall. 409 (1792). Much more than legal niceties are at stake here. The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects. *See United States v. Richardson*, 418 U. S. 166, 179 (1974); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U. S. 208, 227 (1974). For a court to pronounce upon the meaning or

> the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act *ultra vires.*" *Steel Co. v. Citizens for A Better Environment, Id.*, at Lexis Note 49.

If treated as precedent,[16] the appellate decision would permit significant expansion of federal supplemental jurisdiction. The appeals court addresses appellant's argument that its ruling even applies to sham federal claims. The appellate opinion, if allowed to stand, would allow jurisdiction even where the parties acknowledge that the federal count below was a sham. *Farrell v. Monsen*, slip op., at note 4, at 5. The Opinion would permit a trial court to find and then retain federal jurisdiction in any case in which a federal statute is asserted in the complaint, even if the pled federal cause of action is invalid on its face and subsequently withdrawn.[17] Under *Farrell*, the requirement

---

[16] Appellant preserved the issue that the Circuits' practice of deciding cases but withholding them from publication as a way of prohibiting their use as precedent. The practice ought to be *ultra vires* for an Article III court and converts the core principles of *stare decisis* to *stare secretas*. Petitioner fears that including that issue in the briefs will weaken the likelihood that the writ will issue. Unelected courts in republics cannot find the law and then conceal the use of their words from *stare decisis* by hiding the *decisis* and prohibiting citation to it as authority. "[P]ublication of judicial opinions ... is an accepted and constituent part of the judicial process...." *Murray v. Brancato*, 290 NY 52 (1942) [Finch, dissenting] The Fourth Circuit denied petitioner's motion to publish opinion. ORDER (January 9, 2004). But, even in the absence of publication, the *ratio decidendi* provides a good faith basis for a litigant to ask a trial court to exercise the discretion that exists under the unpublished opinion.

[17] The Fourth Circuit vastly expanded one of its diversity jurisdiction decisions in support of this creation of hypothetical jurisdiction. In *Shanaghan v. Cahill*, 58 F.3d 106, 110 (4th Cir. 1995), cited by the Court for this proposition, *Farrell*, slip op., at 5, the complaint stated a proper cause of action. When one of the three loan notes pled upon in *Shanaghan* was lost and could not be proven, the jurisdictional amount became inadequate. At the time of the complaint, the claim was proper, and the federal court had proper jurisdiction. But, under the decision in *Farrell*, even if the parties agree that that the federal count was a sham, supplementary jurisdiction is discretionary. This is a great leap from the

to state a valid *prima facie* federal claim as an "antecedent question" to supplemental jurisdiction over state claims is absent. *Cf. Steel Co. v. Citizens for A Better Environment*, 523 U.S. 83, slip op., at 8-17 (1998).

After viewing "Farrell's post-trial actions as those of a somewhat sore loser who is upset that his chosen forum rendered an unfavorable verdict," *Farrell v. Monsen*, slip op., at 7, App. A-8, this Court reversed the hornbook law that "If a Court of Appeals has no jurisdiction, it cannot obtain it by the consent,[18] stipulation,[19] or waiver of the parties.[20]" 4 AM.JUR. 2d., Appellate Review, § 76, at 701 (1995 ed.). The consideration by the full Court is therefore necessary to secure and maintain uniformity of the Court's decisions.[21]

---

ruling of this Court in *Shanaghan*, in which the Circuit wrote: "Of course, if plaintiff has alleged only a small amount of damages or it is otherwise obvious that the jurisdictional amount under § 1332(a) cannot be satisfied, the court must dismiss the case outright for lack of jurisdiction. *Wiggins v. North American Equitable Life Assurance Co.*, 644 F.2d 1014, 1016-18 (4th Cir. 1981). In this case, by contrast, it appears from the face of the complaint that Shanaghan had alleged claims totaling well over the $50,000 limit."

[18] *Citing, Four Hundred & Forty-Three Cans v. U.S.*, 226 U.S. 172, 57 L.Ed. 174, 33 S.Ct. 50 (1912).

[19] *Citing, In re Stable Mews Assoc.*, 778 F.2d 121 (2d Cir. 1985), 13 BCD 1251, CCH Bankr.L.Rptr ¶ 70871; *Borne v. A&P Boat Rentals No. 4, Inc.*, 755 F.2d 1131 (5th Cir. 1985), 1 FR Serv. 3d 220, *later* 780 F.2d 1254 (5th Cir. 1985).

[20] *Citing, Demulso Corp. v. Tretolite Co.*, 74 F.2d 805 (10th Cir. 1934).

[21] The opinion acknowledges that plaintiff and his counsel refer to the federal count of the complaint as a sham. Even if that is not a precisely accurate rendition of plaintiff's point, subsequent litigants will find this acknowledgement useful. If a sham federal claim can establish federal jurisdiction and leave the trial court with discretion to retain that jurisdiction, then surely an "immaterial, wholly insubstantial and frivolous, or otherwise so devoid of merit as not to involve a federal controversy" federal claim is sufficient to get into court. *But see, Steel Co. v. Citizens for A Better Environment*, 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998), *citing, see, e.g., Oneida Indian Nation of N. Y. v. County of Oneida*, 414 U. S. 661, 666. Once jurisdiction is established with the sham claim, it cannot be a violation of Rule 11 for that same litigant to ask a the trial

Even if it is adequate protection that federal trial judges could exercise their discretion to act as the gatekeepers to federal jurisdiction by dismissing some of these cases, and even if the decision is concealed from public view and precedential value as an unpublished opinion, the appellate opinion provides a good faith basis – and, thus, immunity – from FED.R.CIV.PROC. Rule 11. Litigants may assert baseless federal claims as a means of obtaining federal jurisdiction over supplementary state claims, so long as the federal claims are withdrawn timely. It could now take no more than an agreement between counsel to proceed in federal court on a state claim in the federal courts following *Farrell*. The stipulation of hypothetical jurisdiction would occur as follows:

- plaintiff proposes the sham or, optimally, some marvelously creative federal claim;
- defendants consent for their own reasons, such as the perception of friendlier juries, quicker adjudication, different calendar control, or, for that matter, proximity of the courthouse to counsel's office;
- or, plaintiff feels safe that Rule 11 sanctions can be avoided because: 1) the defendant won't move to dismiss until after discovery, 2) the federal claim is sufficiently colorable, 3) the plaintiff will be able to rely on the safe harbor provisions of Rule 11, or 4) it is worth the risk;
- neither side moves to dismiss the federal claim until pretrial, and neither side seeks sanctions;[22]

---

judge to exercise discretion that a federal court of appeals concludes exists.

[22] While preferable, the failure of this step is of little practical consequence. If defendant's counsel breaches the litigation agreement by moving to dismiss or seeking sanctions, plaintiff can counter by withdrawing the federal count prior to the filing of a sanctions motion or a hearing on the motion to dismiss. If plaintiff's counsel breaches the litigation agreement by failing to dismiss before pretrial, defendant counters by moving to dismiss and for sanctions. Either way, the plaintiff asks the trial court to exercise the discretion recognized by the Fourth Circuit in this case, and, if the trial court declines, re-files in the state

- upon withdrawal of the federal claim, one or both sides ask the court to exercise the discretion to "retain" jurisdiction over the supplementary claims.[23]

Under *Farrell*, jurisdiction can be manufactured in the federal court where it could not otherwise exist. Even if the trial court exercises its discretion to dismiss the state claims, the downside risk for counsel is quite limited. It cannot be a sham to ask a trial court to exercise its discretion, and 28 U.S.C. § 1367 contains a tolling provision so the matter can be re-filed in state court if the request fails. The decision, even if unpublished, will become a major landmark in defining safe harbors for testing the extent of federal jurisdiction over purely state claims merely because the Fourth Circuit feels an attraction to expand its jurisdiction in

---

courts under the 30-day tolling provision of 28 U.S.C. § 1367(d). In the common adage: "Nothing ventured, nothing gained." With a mandate on counsel to pursue matters zealously within the bounds of the law, *see* Virginia Supreme Court Rules (Professional Responsibility) 6:2-1, and no risk to the client for the venture, it would seem to be unethical not to file a sham federal claim if zealous counsel believes that the client's state claims can be better addressed in the federal courts. Plaintiff is at no risk for a sham complaint, FED.R.CIV.PROC. 11(c)(2)(A), and counsel is in conflict if he or she must consider personal or professional peril above the zealous pursuit of the client's cause within the bounds of the law. If that statement is too shocking, it is mere prelude to the lesser included statement that a creative, even if illusory, *Bivens*-type claim can be drafted for any state cause, and a less creative federal claim can be pled for almost every claim imaginable. Any top law student ought to be able to fashion a federal cause for anything if it doesn't need to survive a motion to dismiss. As questioned by the Chief Justice in the oral argument of *Grupo Dataflex*, if the law encourages manipulation, perhaps it is the law, rather than the learned advocates, that ought to change.

[23] It is plausible that the trial court will not be enamored with the inherent humor of the bootstrap argument. If the trial court threatens sanctions, the litigant dismisses the federal count forthwith. This averts monetary sanctions as to the federal claim, FED.R.CIV.PROC. 11(c)(2)(B). Counsel delivers a copy of the *Farrell* opinion. Even if it lacks value as a precedent, the Opinion must surely shield counsel from the assertion that there is no basis to ask the trial court to use its discretion to "retain" jurisdiction after a sham federal complaint.

order to prevent Mr. Farrell from being a sore loser.[24]

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted. The judgment of the court of appeals should be reversed, and judgment should be rendered dismissing this case for lack of subject matter jurisdiction.

Respectfully submitted,
Richard S. Sternberg
Counsel of Record
Barrister's Place, Suite #7
751 Rockville Pike
Rockville, Maryland 20852
(202) 530-0100

---

[24] In fact, as counsel learned after the argument, it was both Monsen's and Farrell's counsel who were skillfully seeking to impose jurisdiction on the federal court. Malloy Woodbridge, LLC, and Malloy Lincoln Mercury, Inc., issued a Rule 11 letter threatening a motion for sanctions if the claim was not withdrawn, and it was dutifully withdrawn. Both of the remaining parties were seeking to impose jurisdiction on the federal courts by stipulation.

TABLE OF CONTENTS
Appendix to Petition

Appendix Page

Opinion of
The United States Court of Appeals
For the Fourth Circuit
entered December 3, 2003 ..... App. A-1

Memorandum and Order of
The United States District Court
for the Eastern District of Virginia
entered September 5, 2002 ..... App. B-1

Memorandum and Order of
The United States District Court
for the Eastern District of Virginia
entered April 25, 2002..... App. C-1

Order of
The United States Court of Appeals
For the Fourth Circuit
Re: Denying Petition for Rehearing
and Rehearing En Banc
entered December 30, 2003 ..... App. D-1

Statutes Involved..... App. E-1

APPENDICES

Appendix A — Opinion of the United States Court of Appeals for the Fourth Circuit Dated and Filed December 3, 2003

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETER FARRELL SUPERCARS, INCORPORATED; PETER FARRELL,
Plaintiffs-Appellants,

v.

GORDON MONSEN,
Defendant-Appellee, No. 02-2230

and

DAVID C. PENNER; JOHN ROBERT DUFF, JR.; MALLOY WOODBRIDGE, LLC; MALLOY LINCOLN MERCURY, INCORPORATED,
Defendants.

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
James C. Cacheris, Senior District Judge.
(CA-01-1073-A)

Argued: October 31, 2003
Decided: December 3, 2003
[ENTERED: DECEMBER 3, 2003]

Before NIEMEYER, WILLIAMS, and DUNCAN, Circuit Judges.
Affirmed by unpublished per curiam opinion.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Richard Steven Sternberg, Rockville, Maryland, for Appellants. Francis Eugene Purcell, Jr., WILLIAMS MULLEN, McLean, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See
Local Rule 36(c).

OPINION

PER CURIAM:

Peter Farrell Supercars and its owner, Peter Farrell, (collectively Farrell) appeal from a jury verdict in favor of Gordon Monsen, a disgruntled Farrell's customer. Farrell's original complaint stemmed from negative statements that Monsen posted on the internet.[1] It included several state claims and a federal Lanham Act claim. In response to Farrell's complaint, Monsen filed several counterclaims alleging breach of contract, fraud and violations of the Virginia Consumer Practices Act. The jury found in favor of Monsen on all claims and counterclaims. Farrell argues that the district court abused its discretion by retaining the action after it dismissed the federal claim under the Lanham Act, erred by holding that Monsen's counterclaims were compulsory and were not time barred, and abused its discretion by awarding attorney's fees to Monsen. We affirm.

I.

The facts relevant to this appeal arise out of a souring of the business relationship between Farrell and one of his customers, Gordon Monsen. Although Farrell initially claimed that a conspiracy among a former Farrell Supercars' employee, John Duff, and some of Farrell's business competitors had damaged Farrell's reputation and business, by the time the trial began the only parties remaining in the action were Farrell and Monsen. Monsen owned a Mazda

RX-7 that he took to Farrell for improvements in December 1998. Specifically, Monsen wanted Farrell to install a 500-horsepower single-engine turbo kit, perform a race-ported engine exchange, and make other minor adjustments. Monsen believed that the term "engine exchange" meant that Farrell would remove and rebuild his own engine, not that Farrell would literally exchange his engine with that from another car. An invoice dated December 21, 1998, listed the improvements Farrell would make, including the "race-ported engine-exchange." (J.A. at 83.)

---

[1]Farrell's complaint named multiple defendants, but by the time trial commenced only Monsen remained.

Monsen picked up the car on May 14, 1999, and drove it home to Pennsylvania. Monsen experienced difficulties with the car's driveability almost immediately, and, after the engine caught fire while Monsen was out for a drive, Monsen took the car to KD Rotary, a Pennsylvania mechanic. At that time, in May 1999, KD Rotary determined that the engine fire was caused by the proximity of the engine wiring harness to the turbo charger and the absence of a heat shield. KD Rotary also found faulty wiring and soldering that fell below industry standards. Monsen continued to have difficulties with the car and returned to KD Rotary in August 2000. KD Rotary removed the turbo kit and sent it to a specialist, who replaced that turbo kit with a new one because the kit that Farrell had installed was severely worn.

Armed with a new turbo kit, Monsen began driving the Mazda RX-7 again. One week later, in September 2000, the engine simply stopped working. KD Rotary, for the first time, decided to remove the entire engine for examination. Upon inspecting the engine, KD Rotary found that the engine failed due to excessive wear. KD Rotary noticed that the vehicle identification number (VIN) on the engine did not match the VIN for Monsen's car, and the name "Ed Taylor" was found scratched on the engine. Ed Taylor had

previously offered to sell his car, also a Mazda RX-7, to Monsen, but Monsen had declined because Taylor's car had substantially more miles than Monsen's. Monsen thus believed that Farrell had switched Taylor's engine, which had over 100,000 miles on the odometer, for his, which had only 25,000 miles.

In response to this perceived wrong, Monsen began posting messages regarding his business transactions with Farrell on an internet bulletin board for RX-7 enthusiasts. For example, Monsen wrote on June 1, 2001:

> [I] strongly recommend that whoever is considering peter feral talk to any of the many people that peter has mistreated and ripped off by selling them retitled out-of-state cars that anything could have happened to and virginia still gives a good clean title for, or charging for work not done as expected.

(J.A. at 52.)

Farrell countered by bringing this action on July 9, 2001, in the United States District Court for the Eastern District of Virginia, alleging violations of the Lanham Act, 15 U.S.C.A. § 1125 (West 1998 & Supp. 2003), and seven state common law claims for defamation and tortious interference with a business relationship.[2] Monsen counterclaimed for breach of contract, fraud and violations of the Virginia Consumer Practices Act (VCPA), Va. Code Ann. § 59.1-200 *et seq.* (Michie 2001). The district court dismissed Farrell's Lanham Act claim on April 25, 2002, principally because Monsen was not in competition with Farrell and did not disseminate his statements as advertisements. A jury trial commenced on June 11, 2002. On that date, Farrell took a non-suit as to the former employee John Duff, leaving only Monsen as a defendant. The jury found for Monsen on all of Farrell's counts, and also found for Monsen on all of his counterclaims. Accordingly, the jury awarded Monsen $10,000 for breach of contract, $5,000 for fraud, $5,000 in punitive damages, and $5,000 for the VCPA violations. The VCPA award was statutorily trebled to $15,000. After

denying Farrell's motion for a new trial, the district court awarded Monsen $55,823.50 in attorney's fees, limiting the fee award to those fees incurred on the VCPA claim. This timely appeal followed. We possess jurisdiction to hear the appeal under 28 U.S.C.A. § 1291 (West 1993).

II.

On appeal, Farrell argues that the district court abused its discretion by retaining the action after it dismissed the Lanham Act claim, erred in ruling that Monsen's counterclaims were compulsory and timely, and abused its discretion in awarding Monsen attorney's fees.[3] We address each of these arguments in turn.

Supplemental Jurisdiction

Farrell first argues that the district court abused its discretion by refusing to dismiss the remaining state law claims after it dismissed the sole federal claim, the Lanham Act claim.[4] We disagree. District courts have supplemental jurisdiction over state law claims that "form part of the same case or controversy" as the federal claim. 28 U.S.C.A. § 1367(a) (West 1993). A district court, however, "may decline to exercise supplemental jurisdiction over a claim" when the court "has dismissed all claims over which it has original jurisdiction." 28 U.S.C.A. § 1367(b)(3) (West 1993).

---

[2] Farrell's complaint named other defendants who, by virtue of settlements and non-suits, are not relevant to this appeal.

[3] Farrell also complains of two errors regarding the jury instructions and verdict form. We find both to be without merit and affirm the district court's findings and conclusions based on its reasoning.

We review a district court's actions under § 1367 for abuse of discretion. *Shanaghan v. Cahill*, 58 F.3d 106, 109 (4th Cir. 1995) Farrell believes that, because the federal claim was dismissed before trial, the district court abused its discretion by retaining the numerous state law claims. The doctrine of supplemental jurisdiction is one of flexibility, and there is no

"mandatory rule" requiring dismissal when the federal claim is disposed of before trial. *Carnegie Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988). Likewise, in *Shanaghan*, we noted that district courts enjoy "wide latitude" when deciding whether to exercise supplemental jurisdiction in an action. *Shanaghan*, 58 F.3d at 110. We instructed district courts to consider the "convenience and fairness to the parties, the existence of any underlying issues of federal policy, comity, and considerations of judicial economy." *Id.* Applying those factors in *Shanaghan*, we held that a district court was not required to dismiss a diversity action where, after the action began, one of the claims was dismissed, leaving the claimed damages below the amount in controversy requirements. We did caution, however, that a court must inquire into "whether plaintiff was consciously relying on flimsy grounds to get into federal court." *Id.* at 112.

In response to Farrell's motion for a new trial, the district court explained its decision to retain the remainder of the case, noting "the parties had completed substantial pre-trial

---

[4]In the alternative, Farrell argues that the district court never had jurisdiction over the action because the federal claim was a sham. In fact, at argument Farrell's appellate counsel made the somewhat unusual suggestion, with his client's blessing, that his client should be sanctioned for his trial counsel having filed such a spurious claim. Although this strategy may have been a clever attempt to fall within the purview of the safeharbor provision of Federal Rule of Civil Procedure 11 and thus relieve Farrell of the adverse jury verdict, we must reject it because Farrell's complaint, on its face, stated a Lanham Act claim against the defendants that provided federal question jurisdiction pursuant to 28 U.S.C.A. § 1331 (West 1993) and original jurisdiction pursuant to 28 U.S.C.A. § 1338 (West Supp. 2003). Because multiple defendants, some of whom were competitors of Farrell, were dismissed before the Lanham Act claim was disposed of by the district court, the fact that Farrell did not state a claim under the Lanham Act against Monsen, standing alone, does not dictate a finding that the Lanham Act claim was a sham when filed.

---

preparation,"[5] and the court "was already familiar with the facts and issues." (J.A. at 168.) Therefore, the court

continued, "dismissal at that late date therefore would not have been fair to the parties, and also would not have been an efficient use of judicial resources." (J.A. at 168.)

The district court's decision to retain jurisdiction over the state law claims was not an abuse of discretion. The district court followed the procedure outlined in *Shanaghan*, taking into consideration the number of state law claims remaining as well as the length of time the parties had already spent preparing for trial. The district court also appropriately considered its familiarity with the parties and issues as a factor favoring retention of the state law claims. The Lanham Act claim was not disposed of until the eve of trial,[6] almost eight months after the complaint was filed, and the remaining state law claims, although numerous, had been developed and refined throughout the pretrial period. The district court deserves "wide latitude" in making its determination under § 1367, *see Shanaghan*, 58 F.3d at 110, and did not abuse that discretion by retaining jurisdiction.

Furthermore, we would be remiss if we failed to note the curious procedural posture of this appeal. Typically in supplemental jurisdiction cases, the plaintiff is complaining because the district court failed to retain his supplemental state law claims. Here, Farrell, the plaintiff, is complaining because the district court in which he filed his federal and state law claims used its discretion to retain the state law claims after dismissing the federal claim. Farrell now claims that he used the Lanham Act claims as a "hook" with which to bring the state law claims under federal jurisdiction. Under these circumstances, we cannot help but view Farrell's post-trial actions as those of a somewhat sore loser who is upset that his chosen forum rendered an unfavorable verdict.

---

[5]For example, the parties had filed numerous motions, appeared four times before the district court and numerous times before the magistrate judge, completed discovery and filed witness lists with the court by the time the Lanham Act claim was dismissed.

[6]Although the trial did not commence until June 11, 2002, it was scheduled to begin in April 2002, but was stayed so that Farrell could

attempt to serve notice on one of the co-defendants.

Given the district court's careful consideration of the factors listed in *Shanaghan*, and the wide latitude the district court possesses when acting under § 1367, we cannot say that the district court abused its discretion in choosing to retain the state law claims after dismissing the Lanham Act claim.[7]

The Counterclaims

Farrell's next contention is that the district court erred in finding that Monsen's counterclaims were compulsory within the meaning of Federal Rule of Civil Procedure 13(a). That rule requires a party to state "as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." Fed. R. Civ. P. 13(a). If a counterclaim is compulsory, a district court requires no independent jurisdictional basis to entertain it. Farrell argues that Monsen's counterclaims were not compulsory and, because there was no independent jurisdictional basis for them, those claims should have been dismissed.

We review a district court's finding that a counterclaim is compulsory de novo. *Painter v. Harvey*, 863 F.2d 329, 331 (4th Cir. 1988). In *Sue & Sam Mfg. Co. v. B-L-S Const. Co.*, 538 F.2d 1048, 1051- 1053 (4th Cir. 1976), we identified four inquiries that help in determining whether a counterclaim is compulsory: (1) Are the issues of fact and law raised in the claim and counterclaim largely the same? (2) Would res judicata bar a subsequent suit on the party's counterclaim, absent the compulsory counterclaim rule? (3) Will substantially the same evidence support or refute the claim as well as the counterclaim? and (4) Is there any logical relationship between the claim and counterclaim? "A court need not answer all these questions in the affirmative for the counterclaim to be compulsory." *Painter*, 863 F.2d at 331. Instead, the test works "less like a litmus, more [like] a

guideline." *Id.* Of course, the "underlying thread" to each inquiry is "evidentiary similarity," and "where . . . the same evidence will support or refute both the claim and counterclaim, the counterclaim will almost always be compulsory." *Id.* at 331-332.

7Because we find that the district court did not abuse its discretion in retaining the state law claims, we offer no opinion as to whether the district court also possessed diversity jurisdiction under 28 U.S.C.A. § 1332 (West 1993 & Supp. 2003).

With this framework in mind, we turn to the instant case. The district court, in reviewing Farrell's motion to dismiss the counterclaims, determined that each inquiry weighed in favor of finding that the claims are compulsory. We agree. The key inquiry, as we made clear in *Painter*, is the evidentiary similarity of the claims. Here, Monsen's counterclaims necessarily involve the same evidence as Farrell's original claims. Monsen is alleging that Farrell performed poor work on his automobile. Farrell is suing Monsen for statements made in response to that work. The evidence involving both claims would necessarily center on the customization work performed by Farrell. *Cf. Albright v. Gates*, 362 F.2d 928, 929 (9th Cir. 1966) (holding that a counterclaim for fraud was compulsory to a claim for slander because there was "sufficient identity or overlapping of the events of the factual background").

There is a logical relationship between the claims because they "essentially ar[o]se from the souring of [the parties'] business relationship." *Banner Indus. of N.Y., Inc. v. Sansom*, 830 F.Supp. 325, 328 (S.D. W. Va. 1993) (finding a counterclaim for breach of contract and fraud to be compulsory to a claim of defamation). The issues of fact and law are similar because "essentially the same burden" would exist in the breach of contract and defamation claims. *Sun Shipbuilding & Dry Dock Co. v. Virginia Elec. & Power Co.*, 69 F.R.D. 395, 397 (E.D. Pa. 1975) (seminal case finding that counterclaims for breach of contract are compulsory to

claims of defamation).

Because we have stated that evidentiary similarity is the most important inquiry, and because there is both evidentiary similarity and a logical relationship between Farrell's original claims and Monsen's counterclaims, we find that the district court was correct in holding that Monsen's counterclaims were compulsory within the meaning of Rule 13(a). Likewise, we find no error in the district court's reasoned analysis of the res judicata and overlap-of-facts-and-issues inquiries.

Farrell argues in the alternative that Monsen's counterclaims are time barred. It is undisputed that the invoice for Monsen's RX-7 is dated December 1998, and that the work was completed on Monsen's car by May of 1999. Farrell filed his complaint in July 2001, more than two years after the alleged breach of contract and fraud. The district court recognized that Monsen's counterclaims were filed more than two years after the claims accrued but submitted to the jury the question of whether application of the discovery rule made Monsen's counterclaims timely.

We review the district court's determination and application of state law de novo. *Salve Regina Coll. v. Russell*, 499 U.S. 225 (1991). The statute of limitations for fraud and violations of the VCPA is two years.[8] Va. Code Ann. § 59.1-204.1 (Michie 2001). Virginia law generally states that actions accrue at the time of injury, not the time of discovery. Va. Code Ann. § 8.01-230 (Michie 2000). An exception exists for actions in fraud;[9] such claims accrue when the fraud is discovered or when it should have been discovered by the exercise of due diligence. Va. Code Ann. § 8.01-249.1 (Michie 2000). The question of whether a party used due diligence to discover the fraud "must be ascertained by an examination of the facts and circumstances unique to each case." *STB Mktg. Corp. v. Zolfaghari*, 393 S.E.2d 394, 397 (Va. 1990). The district court did not err in allowing the jury to determine whether Monsen had used due diligence to find that Farrell literally

had switched his engine for another. While it is true that Monsen was displeased with Farrell's work from the time he received the car, Monsen had no reason to suspect that his engine had been replaced. Monsen was diligent and continued to have the car inspected by other mechanics. Monsen did not sit on his rights for two years but kept searching for answers to his car problems until September 2000, when KD Rotary for the first time found that Monsen's engine had been replaced with Ed Taylor's. The district court correctly ascertained Virginia law and did not err in applying the discovery rule.

Attorney's Fees

Farrell also disputes the district court's award of attorney's fees to Monsen's two attorneys,[10] arguing both that Monsen failed to introduce evidence that the fees charged were reasonable, and that the award violated the Virginia Code. We review a district court's award of attorney's fees for abuse of discretion. *Am. Reliable Ins. Co. v. Stillwell*, 336 F.3d 311, 320 (4th Cir. 2003). Because the district court granted fees pursuant to a Virginia statute,[11] we look to Virginia's standards for determining if the fee award is reasonable.

---

[8]The breach of contract counterclaim was timely because Virginia's statute of limitations for breaches of contract is five years. Va. Code Ann. § 8.01-246.2 (Michie 2000)

[9]The VCPA claim is for fraudulent misrepresentation and thus also covered by this narrow exception. Va. Code Ann. § 59.1-200(A)(2)(Michie 2001).

[10]Monsen's counsel was acting pro hac vice, and the district court rules require local counsel be retained in those situations. E.D. Va. Local R. 83.1(D).

[11]The VCPA authorizes an award of attorney's fees to prevailing parties. Va. Code Ann. § 59.1-204(B) (Michie 2001).

In Virginia, counsel must "establish, as an element of the attorney's *prima facie* case, that the fees charged . . . are reasonable." *Seyfarth, Shaw, Fairweather & Geraldson v. Lake Fairfax Seven Ltd.*, 480 S.E.2d 471, 473 (Va. 1997). When

determining if the party has met that burden, "the fact finder should consider such circumstances as the time consumed, the effort expended, the nature of the services rendered, and other attending circumstances." *Mullins v. Richlands Nat'l Bank*, 403 S.E.2d 334, 335 (Va. 1991). A court should "weigh the testimony of attorneys as to the value of the services, by reference to their nature, the time occupied in their performance, and other attending circumstances, and by applying to it their own experience and knowledge of the character of such services." *Holmes v. LG Marion Corp.*, 521 S.E.2d 528, 533 (Va. 1999) (quoting *Beale v. King*, 132 S.E.2d. 476, 478-79 (Va. 1963)). Expert testimony regarding the reasonableness of the fees is not required in every case. *See Tazewell Oil Co. v. United Va. Bank*, 413 S.E.2d 611 (Va. 1992) (holding affidavit and billing records sufficient); *Seyfarth, Shaw*, 480 S.E.2d at 473 (holding testimony regarding complexity of the work sufficient).

Monsen's counsel submitted detailed billing records and testified as to both attorneys' billing practices. The district court carefully reviewed the records, and rejected almost one-third of the fees as duplicative or unrelated to the VCPA claim. The district court also relied on its own experience, noting Monsen's chief counsel possessed "apparent trial experience." (J.A. at 185.) Regarding the reasonableness of the rate charged by Monsen's local counsel, the district court found the rate well within "the rates charged for local counsel services in the metropolitan District of Columbia area." (J.A. at 185-186.) The district court did not abuse its discretion in deciding to award attorney's fees because it carefully followed the dictates of the Virginia Supreme Court and conducted a detailed analysis of the billing records before determining that the rates charged were reasonable.

Farrell also argues that the award violates the Virginia Code because the Code prohibits an award of fees to more than one attorney. Section 17.1-625 states, "[a]lthough the party recovering may have had more than one attorney,

only the fees of one shall be taxed in the same court." Va. Code Ann. § 17.1-625 (Michie 2003). Virginia courts have yet to rule on the meaning of this section, but we believe that, *assuming arguendo* that the section prohibits more than one attorney from receiving a fee award, the district court followed the legislature's intent in this action. The district court removed all of the duplicative fees from the lodestar when calculating the award. Thus, by its actions, the district court was, in fact, ensuring that only one attorney's worth of work was being credited in the fee award. Because the district court followed the clear intent of the Virginia Code, we do not find the award of attorney's fees to be an abuse of discretion.

III.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

Appendix B — Memorandum and Order of the United States District Court for the Eastern District of Virginia, Alexandria Division, Dated and Entered September 5, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

PETER FARRELL SUPERCARS, INC., et al.

Plaintiffs,

v.

DAVID C. PENNER, et al.
Defendants.
Civil Action No. 01-1073-A

[ENTERED: SEPTEMBER 5, 2002]

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby ORDERED that:

1) Plaintiff's Rule 59 Motion is DENIED;

2) the June 14, 2002, Judgment is hereby AMENDED to reflect that Peter Farrell is not liable in his individual capacity for the $10,000 awarded by the jury for Breach of Contract; and

2) the Clerk of the Court shall forward copies of this Order and the accompanying Memorandum Opinion to all counsel of record.

September 5th , 2002
Alexandria, Virginia
UNITED STATES DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

PETER FARRELL SUPERCARS, INC., et al.
Plaintiffs,

V.

DAVID C. PENNER, et al.
Defendants.
Civil Action No. 01-1073-A

[ENTERED: SEPTEMBER 5, 2002]

MEMORANDUM OPINION

This matter is before the Court on Plaintiffs' Rule 59 Motion.

I. Background

Plaintiffs Peter Farrell Supercars, Inc. ("'PFS") and Peter Farrell ("Farrell") (collectively "Plaintiffs") filed suit against Defendant Gordon Monsen ("Monsen") and several other codefendants in this Court on July 9, 2001.

The dispute between Plaintiffs and Monsen arose when Monsen published a series of statements on an internet message board stemming from his dissatisfaction with work performed on his Mazda RX-7 automobile by Plaintiffs. Specifically, Monsen stated on March 7, 2001, that "there is no such thing as a 'pfs pmc.' It is an lefi systems pms' (programmatic management system) that Farrell markets for them on a non-exclusive basis." (Compl. 1 27.) Further, on June 1, 2001, Monsen stated that

"whoever is considering peter feral talk to any of the many people that peter has mistreated and ripped off by selling them retitled out-of-state cars that anything could have happened to and virginia still gives a good clean title for, or charging for work not done as expected or charging for new parts when they were used ... on and on ... (Compl.

9t 28.)

Plaintiffs' Complaint included the following counts: (I) Commercial Defamation / Trade Disparagement; (II) Defamation -per se; (III) Defamation per quod; (IV) Insulting Words; (V) Civil Assault; (VI) Civil Conspiracy; (VII) Tortious Interference with Existing Contractual or Business Relationships; and (VIII) Tortious Interference with Prospective Contractual or Business Relationships.

In conjunction with his Answer to Plaintiffs' Complaint, Monsen filed the following counterclaims: (I) breach of contract; (II) fraud; (III) abuse of process; and (IV) violation of the Virginia Consumer Protection Act (the "VCPA"). Plaintiffs' initial motion to dismiss these counterclaims was referred to Judge Lee, who dismissed it without prejudice on April 4, 2002, due to its close proximity to the initial trial date of April 8. On April 8, the Court continued the trial date until June 11, 2002. Oral argument regarding Monsen's motion to dismiss the Complaint and motion to amend counterclaims was heard on April 19. On April 25, the Court granted Monsenrs Motion to Amend Counterclaims and denied Plaintiffs' Motion to Dismiss [2] Counterclaims without prejudice pending Monsen's amendment. It also dismissed Count I of the Complaint with prejudice pursuant to Monsen's Motion to Dismiss, and further dismissed Counts IV, VII, and VIII without prejudice pursuant to the agreement of the parties.

In response to Plaintiffs' motion to dismiss the amended counterclaims, the Court dismissed Monsen's counterclaim for abuse of process without prejudice, but allowed the remainder of his counterclaims to be submitted to the jury. The Court also granted Plaintiffs' motion for nonsuit as to Duff.

On June 14, 2002, following trial and deliberations, the jury found in favor of Monsen on all aspects of the complaint and counterclaims, and awarded him damages totaling $35,000 ($10,000 for breach of contract, $5,000 for fraud, $5,000 in punitive damages, and $15,000 for violation

of the Virginia Consumer Protection Act (""VCPA")). With regard to the statute of limitations issue, the jury found that Monsen should not reasonably have been aware of Plaintiffs' fraud until September 20, 2002, thereby negating Plaintiffs' argument that Monsen's fraud and VCPA claims were barred by the statute of limitations. The parties are now before the Court on Plaintiffs' Rule 59 Motion.

II. Standard of Review

Rule 59 of the Federal Rules of Civil Procedure [3] provides, in pertinent part, as follows: "A new trial may be granted to all or any of the parties and on all or part of the issues ... for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." Fed. R. Civ. P. 59(a). Generally speaking, new trials are ordered if "(1) the verdict is against the clear weight of the evidence, or (2) is based upon evidence which is false, or (3) will result in a miscarriage of justice, even though there may be substantial evidence which would prevent direction of a verdict.'" See Cline v. Wal-Mart Stores, Inc., 144 F.3d 294, 301 (4th Cir. 1998) (quoting Atlas Food Systems and Serv., Inc. v. Crane Nat'l Vendors, Inc., 99 F.3d 587, 594 (4th Cir. 1996)). The first two prongs of the standard apply to the review of "jury determinations of factual matters such as liability on a cause of action, liability for compensatory and punitive damages, and the amount of compensatory damages." Atlas Food, 99 F.3d at 594.

III. Analysis

Here, Plaintiffs contend that the entire case should be dismissed because the Court lacked subject matter jurisdiction following the dismissal of the Lanham Act claim. In the alternative, Plaintiffs contend that a new trial is warranted because, inter alia, (1) there was no basis in law or fact for the jury's verdict against Farrell in his individual capacity; [4] (2) the Court should not have permitted

Monsen to amend his counterclaims; (3) the Court erred in admitting certain evidence; (4) the jury's verdict evinces confusion with respect to the Court's response to a question regarding damages; (5) Mr. Barninger was impermissibly allowed to offer opinion testimony; and (6) the Court allegedly misread a portion of one of the instructions given to the jury. The Court will address each issue in turn.'

1. Subject Matter Jurisdiction

Plaintiffs' argument that the Court lacked subject matter jurisdiction over the claims presented at trial rests on their assumption that the Court should have dismissed those claims following its dismissal of Plaintiffs' claim arising under the Lanham Act, 15 U.S.C. § 1125 et seg. For the following reasons, the he Court rejects this argument.

As a preliminary matter, the Court, once it determines that jurisdiction is appropriate pursuant to 28 U.S.C. § 1331, must determine whether it has pendent jurisdiction over the remaining state claims. This involves a three-step analysis: (1) the Court must first confirm "the existence of a substantial federal claim"; (2) it must then analyze the relationship between state and federal claims in order to determine whether both sets of claims arise from a common nucleus of operative fact; (3) finally, the Court, in its discretion, must decide whether it is appropriate to hear the state claims. Nicol v. Imagematrix, Inc., 767 F. Supp. 744, 747 (E.D. Va. 1991) (Ellis, J.). Having reviewed the facts of this case in light of the applicable law, the Court finds that (1) there was a substantial federal claim; (2) both the state and federal claims arose from the same common nucleus of operative fact, as all claims were premised on the business transactions between the parties and the subsequent internet postings by Defendant which resulted from his dissatisfaction with the results of those transactions. Cf. Miller v. Asensio, 101 F. Supp. 2d 395, 403 (D.S.C. 2000) (common nucleus of operative fact existed for purposes of personal pendent jurisdiction where all claims arose from

publication on internet website); and (3) it is appropriate to entertain the state claims in this case.

Plaintiffs make a number of other arguments as well, though the Court finds it necessary to respond only to those listed above.

Next, the Court notes that the dismissal of the Lanham Act claim did not deprive it of subject matter jurisdiction, as federal district courts have "wide latitude in determining whether or not to retain jurisdiction over state claims when all federal claims have been extinguished." Shanaghan v. Cahill, 58 F.3d 106, 110 (4th Cir. 1995). Factors relevant to a courtfs decision with respect to whether to retain jurisdiction under such circumstances "are convenience and fairness to the parties, the existence of any underlying issues of federal policy, comity, and considerations of judicial economy.'" Id. "The doctrine of supplemental jurisdiction 'thus is a doctrine of flexibility, designed to allow courts to deal with cases involving pendent claims in the manner that most sensibly accommodates a range of concerns and values.'" Id. (quoting Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 (1988)).

Upon consideration of the above-mentioned factors as they apply to this case, the Court holds that retention of its jurisdiction following the dismissal of the Lanham Act claim was proper. At that point in time, the parties had completed substantial pre-trial preparation and made appearances before the Court, which was already familiar with the facts and issues presented by this case. Dismissal at that late date therefore would not have been fair to the parties, and also would not have been an efficient use of judicial resources.

Furthermore, the exercise of jurisdiction over Defendant's counterclaims was appropriate as well. As another member of this Court has noted, the following factors must be examined in determining whether the requirements of Rule 13(a) are satisfied: "(i) whether issues of fact and law raised by the claim and counterclaim are largely the same; (ii) whether substantially the same

evidence bears on both claims; (iii) whether any logical relationship exists between the two claims." [7] Berger.y. City of North Miami, 820 F. Supp. 989, 992-93 (E.D. Va. 1993) (Ellis, J.) (citing Whigham-v. Beneficial Finance Co., 599 F.2d 1322, 1323 (4th Cir. 1979))2 Upon consideration of the relevant factors, the Court concludes that Defendant's counterclaims unquestionably arose out of the same transaction or occurrence and therefore were compulsory within the meaning of Federal Rule of Civil Procedure 13. Accordingly, the Court had ancillary jurisdiction over such claims. See Painter v. Harvey, 863 F.2d 329, 331 (4th Cir. 1988).

Finally, as Defendant correctly notes, the Court also had diversity jurisdiction over the claims litigated at trial pursuant to 28 U.S.C. § 1332. As conceded at oral argument, both Plaintiffs are residents of Virginia and Defendant is a resident of Pennsylvania. In addition, the state claims contained in the complaint satisfied the amount in controversy requirement at the time they were filed. Contrary to Plaintiffs' assertions at oral argument, the fact that diversity jurisdiction was not affirmatively pled does not prevent the Court from recognizing its obvious existence. See, e.g., Aguirre v. Automotive

2 Other courts have articulated this as a four-part test: "(1) Are the issues Of fact and law raised by the claim and counterclaim largely the same? (2) Would res judicata bar a subsequent suit on defendant's claim absent the compulsory counterclaim rule? (3) Will substantially the same evidence support or reTute plaintiff's claim as well as defendant's counterclaim? (4) Is there any logical relation between the claim and the counterclaim?(4) Is there any logical relation between the claim and the counterclaim?" W.O. Laughlin v. Edwards Bus. Machs., Inc., 155 F.R.D. 543, 545 (W.D. Va. 1994). Regardless of which version of the test is used, the Court would still reach the same conclusion with respect to this issue. [8] Teamsters, 633 F.2d 168, 174 (9th Cir. 1980) (holding that "[i]f facts giving the court jurisdiction are set

forth in the complaint, the provision conferring jurisdiction need not be specifically pleaded") (quoting Williams v. United States, 405 F.2d 951, 954 (9th Cir. 1969)); Charles A. Wright and Arthur R. Miller, 5 Federal Practice & Procedure § 1214 (noting decisions which hold that "the absence of a complete allegation of jurisdiction does not even require amendment of the complaint when the court readily can recognize the existence of federal question or diversity of citizenship and the requisite amount in controversy"). The Court therefore holds that 28 U.S.C. § 1332 provides an alternative basis for jurisdiction in this case.

2. Verdict Against Farrell in his Individual Capacity

Plaintiffs' first argument in favor of a new trial is premised on their assertion that Farrell cannot be held liable in his individual capacity for acts performed by PFS. The Court rejects this argument. It is a well-established principle of Virginia law that "[corporate officers may be liable jointly and severally with their corporation for obligations arising out of tortious conduct of the officers that subject the corporation to liability." Sit-Set, A.G. v. Universal Jet Exchange, Inc., 747 F.2d 921, 929 (4th Cir. 1984). See also Miller v. Quarles, 242 Va. 343, 347, 410 S.E.2d 639, 641 (1991) [9] (holding that "an agent has a tort liability for injuries to a third party resulting from the agent's negligent act while acting within the scope of his employment by the principal"); Airlines Reporting Corp. v. Pishvaian, 155 F. Supp. 2d 659, 666 (E.D. Va. 2001) (Ellis, J.) ("Under Virginia law, an officer or director of a corporation is liable only for those intentional torts he or she commits or authorizes on behalf of the corporation.")(citing cases). This is true regardless of whether the tort claim arises under common law or statute. See PTS Corp. v. Buckman, 263 Va. 613, 622, 561 S.E.2d 718, 723 (2002) (noting the Supreme Court of Virginia's prior holdings regarding personal liability for the tortious acts of corporate officers, and holding that "[ilt is inconsequential that the cause of action is based on statutory

rather than common law" in a case in which the underlying tort is one which existed at common law).

The issue of Farrell's individual liability was submitted to the jury, which unequivocally found in Defendant's favor with respect to this issue. Furthermore, the jury awarded punitive damages, thereby indicating its apparent belief that Farrell's actions were willfully fraudulent. Accordingly, the Court finds that the verdicts against Farrell in his individual capacity for the claims involving fraud were proper.

However, the Court does not believe that a similar rule applies to claims for breach of contract in the absence of a [10] finding that the corporate veil should be pierced. See DiGennaro v. Duvall, Harrigan, Hale & Downey, Law No. 127201, 1994 WL 1031060, at *1 (Va. Cir. Ct. 1994) ("It is clear under general principles of agency law that an agent who contracts on behalf of a disclosed principal, in the absence of an express agreement to the contrary, is not personally bound on the contract.") (citing 1A Michie's Jurisprudence Agency 71 (1993)). Rather, under Virginia law, "in the absence of an agreement to become personally liable on the contract, no liability attaches even when the agent exceeds his authority to act." Id. The judgment will therefore be amended to reflect that only PFS, and not Farrell, is liable for the damages assessed for breach of contract. In accordance with the applicable law and the verdict of the jury, Farrell remains personally liable on all other counts.

3. Amendment of Counterclaims

Plaintiffs next contend that the Court erred in allowing Defendant to amend his counterclaims. The Court heard Plaintiffs' arguments and ruled on this issue in its April 25, 2002, Memorandum Opinion and Order. It sees no basis for revisiting its prior ruling, and therefore rejects Plaintiffs' arguments as to this issue.

4. Admission of Evidence

Plaintiffs next contend that the Court should reconsider

its determination, made during trial, regarding the admissibility of various internet postings. As the Court stated at the time, these postings were not admitted for the truth of the matter asserted therein. The Court instructed the jury accordingly, and does not believe that the potential prejudice of the evidence substantially outweighed its probative value under Federal Rule of Evidence 403. Accordingly, Plaintiffs' argument fails with respect to this issue.

5. The Court's Response to the Jury's Question Regarding Damages

Turning next to the issue of the Court's response to the jury's question regarding damages, Plaintiffs contend that the Court's response confused the jury and led it to award damages under theories of both breach of contract and fraud. The Court does not believe that the jury was in any way confused by its response, and further notes, as it did at trial, that Virginia law clearly allows for such recovery. Hitachi Credit Am. Corp. v. Signet Bank, 166 F.3d 614, 628 (4th Cir. 1999) ("Virginia law recognizes the separate tort of fraud, even where the parties have agreed to a contract, and a plaintiff may recover damages for both fraud and breach of contract.") (internal citation and quotation omitted). Plaintiffs' argument [12] as to this issue is therefore rejected.

6. Admission of Opinion Testimony

Plaintiffs next contend that the Court erred in permitting Mr. Barninger to offer opinion testimony without first conducting a hearing pursuant to Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. S79 (1993), and its progeny. However, Plaintiffs failed to timely object to Mr. Barninger's testimony at trial. Accordingly, their objection was waived. See, e.g., Macsenti v. Becker, 237 F.3d 1223, 1233-34 (10th Cir. 2001), cert. denied, 533 U.S. 950 (2001) (holding that party waived Daubert objection by failing to raise it until after the close of the evidence); Questar Pipeline Co. v.

Grynberg, 201 F.3d 1277, 1289-90 (10th Cir. 2000) (holding that a "party may waive the right to object to evidence on Kumho/Daubert grounds by failing to make its objection in a timely manner"); Virginia Vermiculite, Ltd. v. W.R. Grace & Co., 98 F. Supp. 2d 729, 731 n.1 (W.D. Va. 2000) ("A pretrial request for a Daubert hearing must be made in a timely fashion or the objection is waived.'") (quoting Webster v. Fulton County, 85 F. Supp. 2d 1375, 1377 (N.D. Ga. 2000)). 7. Challenge to Jury Instruction

Finally, Plaintiffs contend that a new trial is justified by its allegation that the Court misread a small [13] portion of its instruction to the jury regarding Defendant's fraud claim. As discussed above, the Court previously allowed Defendant to amend his pleadings in this case. However, it lacks the ability to extend the same courtesy to Plaintiffs with respect to this issue.

As Rule 59 states, "[a)ny motion for a new trial shall be filed no later than 10 days after entry of the judgment." Fed. R. Civ. P. 59(b). Although Plaintiffs' motion was timely filed, they did not raise the issue of the jury instruction until after the ten day time limit passed, and the Federal Rules of Civil Procedure do not permit the Court to enlarge the time for raising such arguments. See Weitz v. Lovelace Health System, Inc., 214 F.3d 1175, 1179 (10th Cir. 2000) ("Rule 59 provides no exceptions to the ten-day rule. Thus, the district court lacked authority to grant Appellant's motion for additional time to file her Rule 59(e) motion.")

Furthermore, even if the Court were able to enlarge the time period in which Plaintiffs may raise such issues, it nevertheless would reject Plaintiffs' arguments in this case. That is, even if the Court inadvertently misread the instruction, Plaintiffs failed to timely object to the instruction at trial, and therefore waived the objection. As Defendant correctly notes, Rule 51 states as follows: "No party may assign as error the giving or the failure to give an instruction unless that [14] party objects thereto before the jury retires to consider its verdict, stating distinctly the

matter objected to and the grounds of the objection." Fed. R. Civ. P. 51.

Furthermore, the misreading of a jury instruction, particularly when not objected to at trial, cannot serve as the basis for a new trial. In Alpha Display Paging, Inc. v. Motorola Communications & Elec., Inc., 867 F.2d 1168 (8th Cir. 1989), "[t)he district court twice mistakenly read 'defendant' where "plaintiff' should have been read" in the course of instructing the jury with respect to a fraud claim. Id. at 1170. As in this case, the party challenging the instruction failed to object at trial. Id. On appeal, the Eighth Circuit held that "the error in a jury instruction not properly objected to is waived unless a miscarriage of justice would otherwise result." Id. It then concluded that "the misreading of the jury instruction was not so grave that a miscarriage of justice resulted," and further noted that "[t]he jury was well aware of the alignment of parties in this case and could not have been confused by the misreading." id.

Finally, the Court notes that Fourth Circuit law holds that "[i]nstructions are adequate if 'construed as a whole, and in light of the whole record, [they] adequately [inform] the jury of the controlling legal principles without misleading or confusing the jury to the prejudice of the objecting party. South Atlantic Limited P'ship of Tennessee v. Riese, 284 F.3d 518, 530 (4th Cir. 2002) (quoting Spell v. McDaniel., 824 F.2d 1380, 1395 (4th Cir. 1987)). Furthermore, "[e]ven if the instructions are flawed, there can be no reversal unless the error seriously prejudiced the challenging party's case." Id. Such cannot be said here. As in Alpha Display, the Court has no doubt that the jury understood the alignment of the parties in this case. Furthermore, the jury was given written copies of the instructions to utilize during its deliberations, and Plaintiffs make no claim that the written version of the instruction was flawed. Accordingly, the Court sees no grounds for awarding a new trial with respect to this issue.

*IV. **Conclusion***

For the foregoing reasons, Plaintiffs' Rule 59 Motion will be denied. The judgment will be amended to reflect that only PFS is liable on Defendant's breach of contract claim. An appropriate Order will issue.

September 5th, 2002
Alexandria, Virginia
UNITED STATES DISTRICT COURT JUDGE

Appendix C — Memorandum and Order of the United States District Court for the Eastern District of Virginia, Alexandria Division, Dated and Entered April 25, 2002.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

PETER FARRELL SUPERCARS, INC., et al.
Plaintiffs,

V. Civil Action No. 01-1073-A

DAVID C. PENNER, et al,
Defendants.

[ENTERED: APRIL 25, 2002]

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby ORDERED that:

1) Defendant's Motion to Amend Counterclaims is GRANTED;

2) Plaintiffs' Motion to Dismiss Counterclaims is DENIED without prejudice;

3) Counts IV, VII, and VIII of the Complaint are DISMISSED without prejudice as to Defendant Monsen pursuant to the agreement of the parties;

4) Defendant Monsen's Motion to Dismiss the remaining counts of the Complaint will be GRANTED as to Count I, and DENTED as to all other Counts; and

5) the Clerk of the Court shall forward copies of this Order and the accompanying Memorandum Opinion to all counsel of record.

April 25, 2002
Alexandria, Virginia
UNITED STATES DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

PETER FARRELL SUPERCARS, INC., et al,
Plaintiffs,
V.
DAVID C. PENNER, et al.
Defendants.
Civil Action No. 01-1073-A

[ENTERED: APRIL 25, 2002]

MEMORANDUM OPINION

This matter is before the Court on Defendant Gordon Monsen's Motion to Amend Counterclaims and Motion to Dismiss.

1. Background

Plaintiffs Peter Farrell Supercars, Inc. ('PFS") and Peter Farrell ("Farrell"') (collectively "Plaintiffs") filed suit against Defendant Gordon Monsen ("Defendant")and several other co-defendants in this Court on July 9, 2001.

The dispute between Plaintiffs and Defendant arose when Defendant published a series of statements on an internet message board stemming from his dissatisfaction with work performed on his Mazda RX-7 automobile by Plaintiffs. Specifically, Defendant stated on March 7, 2001, that "there is no such thing as a 'pfs *pmc.*' *It is an* '*efi* systems pms' (programmatic management system) that Farrell markets for them on a non-exclusive basis." (Compl. 1 27.) Further, on June 1, 2001, Defendant stated that

"whoever is considering peter feral talk to any of the many people that peter has mistreated and ripped off by selling them retitled out-of-state cars that anything could have happened to and virginia still gives a good clean title for, or charging for work not done as expected or charging for new parts when they were used . . . on and on . . - ." (Compl. 5[28.)

The Complaint includes the following counts: (I)

Commercial Defamation / Trade Disparagement; (II) Defamation per -se; (III) Defamation per auod; *(IV) Insulting* Words; (V) Civil Assault; (VI) Civil Conspiracy; (VII) Tortious Interference with Existing Contractual or Business Relationships; and (VIII) Tortious Interference with Prospective Contractual or Business Relationships. Plaintiffs have voluntarily withdrawn Counts IV (Insulting Words), VII (Tortious Interference with Existing Contractual or Business Relationships), and VIII (Tortious Interference with Prospective Contractual or Business Relationships). Defendant now seeks dismissal of Counts I (Commercial Defamation / Trade Disparagement), II (Defamation per se), III (Defamation per quod), and VI (Civil Conspiracy) pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

II.Standard of Review

A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of the complaint and should be granted only if "it [2] appears beyond doubt that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief." *Le* Sole v. United States, 947 F.2d 1169, 1177 (4th Cir. 1991); Rogers v. Jefferson-Pilot Life Ins. Co., 883 F.2d 324, 325 (4th Cir. 1989). In *passing on a* motion to dismiss, "'the allegations of the complaint should be construed favorably to the pleader." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). Moreover, a motion to dismiss must be assessed in light of Rule 8's *liberal* pleading standards, which require only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8.

III Analysis

A. Defendant's Motion to Amend Counterclaims.

As a preliminary matter, the Court notes that it has the discretion pursuant to Rule 15(a) of the Federal Rules of Civil Procedure to grant a party leave to amend its pleadings, and that such leave "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). "The disposition of a motion to amend is within the sound discretion of the

district court," Davis v. Virginia Commonwealth Univ., *180 F.3d 626, 628 (4th Cir.* 1999), and "may be denied when it has been unduly delayed and when allowing the motion would prejudice the nonmovant." Lone Star Steakhouse & Saloon, Inc. v. Alpha of Virginia, Inc., 43 F.3d 922, 941 (4th Cir. 1995).

[3]

Defendant's motion to amend its counterclaims could undoubtedly have been brought sooner, However, this fact alone is generally not a sufficient basis for the denial of such a motion, particularly when there is no clear evidence that the delay was in any way a result of bad faith on the part of Defendant. See Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, 6 Federal Practice *and* Procedure S 1488 (stating that "[i]n most cases, delay alone is not a sufficient reason for denying leave"); § See also Foman v. Davis, 371 U.S. 178, 182 (holding that Rule 15(a)'s mandate *that leave to amend should be freely given when justice requires "is to be heeded").

Following an analysis of the circumstances of this case, the Court finds that the interests of justice would be served by allowing Defendant to amend. The Court further finds that Plaintiffs will not be prejudiced by this ruling, as the trial of this matter has been continued until June 11, 2002. Accordingly, the Court will grant Defendant's Motion to Amend Counterclaims, and will deny *Plaintiffs'* Motion to Dismiss Counterclaims without prejudice- Plaintiffs may, if they choose, timely file and notice a motion to dismiss the amended counterclaims.

B. Defendant's Motion to Dismiss

a. Count I

In his motion, Defendant alleges that Count I fails [4] because the statements made by him do not qualify as "commercial advertising and promotion," and therefore do not fall within the scope of 15 U.S.C. § 1125. As Defendant notes, courts interpreting section 1125 have held that:

> In order for representations to constitute "commercial advertising and promotion" under Section 43(a)(1)(B), they must be. (1) commercial speech; (2) by a defendant who is in commercial competition with plain-tiff; (3) for the purpose of influencing consumers to buy defendant's goods or services. While the representations need not be made in a "classic advertising *campaign,*" *but may* consist instead of more informal types of 'promotion," the representations (4) must be disseminated sufficiently to the relevant *purchasing public* to constitute "advertising" or 'promotion" within that industry.

Gordon & Breach Science Publishers S.A. v. American Institute of Physics, 859 P. Supp. 1521, 1535-36 (S.D.N.Y. 1994). 'Although this four part test has not been expressly adopted by the Fourth Circuit, it has been relied upon by courts within this circuit." Neurotron, Inc. v. American Assoc. of Electrodiagnostic Medicine, No. CIV. A. WMN-00-514, 2001 WL 1805892, at *3 (D. Md. Aug. 13, *2001)(citing* Huntingdon Life Sciences, Ing. v. Rokke, 978 F. Supp. 662, 665 (E.D. Va. 1997) (utilizing standard from Gordon & Breach)). Defendant contends that the allegations contained in the Complaint fail to meet the requirements as set forth in Gordon & Breach. Having carefully reviewed the Complaint and the arguments of the parties with respect to this issue, the Court [5] agrees. Defendant is a financial advisor. (Stipulation of Uncontested Facts at 1.) He therefore cannot possibly be said to be in commercial competition with Plaintiffs, who are in the business of repairing and/or refurbishing automobiles.' The fact that he sought to discourage others from doing business *with* Plaintiffs is not sufficient, standing alone, *to* satisfy the requirements necessary to state a claim pursuant to § 1125. The statements attributed to Defendant were *not* made by someone in commercial competition with Plaintiffs, and also cannot be said to have been disseminated in a manner that constituted advertising" or "'Promotion" within the relevant industry.

Indeed, if the Court were to find that Defendant is *in* commercial competition with Plaintiffs, then virtually anyone who conducts regular business transactions *with* a competitor could be *a* potential Lanham Act defendant. The Court is unwilling to adopt such a broad reading of the Act. *Cf,* Huntingdon Life- Sciences, 978 F. Supp. at 666-67 (refusing to expand Lanham Act to include groups acting with no economic motive, who were not direct competitors, and whose statements could not properly be considered "advertising and promotion" within the meaning of the

[Note] 1.The Court notes Plaintiffs' argument, made at the April 19th hearing regarding this motion, that Defendant had some strange business relationship with one of Plaintiffs' competitors whereby he was permitted to essentially barter various items, including car parts and books, in exchange for services rendered. The existence of such a relationship, even if assumed for purposes of this *motion, can* in no way qualify Defendant as *a* person "in commercial competition with plaintiff" as required to state a claim under the standards set forth in Gordon & Breach and later adopted in this District by Huntingdon Life Sciences.

[6] Act). Accordingly, the Court holds that Plaintiffs have failed to state a claim upon which relief may be granted with respect to Count I of the Complaint.

b. Counts II and III

Defendant challenges Counts II (Defamation Per Se) and III (Defamation Per Quod) on the basis that the statements which serve as the bases for these claims "are not provably false, but instead represent Monsen's opinion with regard to Farrell's services." (Def.'s Mot. to Dismiss at 7.)

The Court notes at the outset of *this analysis that a* plaintiff, in order to state a claim for defamation *under* Virginia law, must establish the *following: (1)* publication about the plaintiff, (2) an actionable statement, and (3) the requisite intent. Chapin v, Greve, 787 F. Supp. 557, 562 (E.D. Va. 1992), aff'd sub norn., Chapin v. Knight-Ridder. Inc., 993

F.2d 1087 (4th Cir. 1993). Whether a statement is actionable is a matter of law for the Court to decide. Yeagle v. Collegiate Times, 255 Va. 293, 296, 497 S.E.2d 136, 138 (Va. 1998). To be actionable, a statement must be both false and defamatory. See, e.a., Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776 (1986). Because the Court must accept Plaintiff's allegations of factual falsity as true for the purposes of the motion to dismiss, the decisive issue is whether the statements are defamatory. See Chapin v. Greve, 797 F. Supp. at 562.

[7]

Under Virginia law, a statement is defamatory if it "tends *to* injure the reputation of the party, to throw contumely, or *to* reflect shame and disgrace *upon* [the party], or *to* hold (the party] up as an object of scorn, ridicule or contempt. Adams v. Lawson, 17 Gratt. 250, 58 Va. 250, 255-56 (Va. 1867). However, "(w)ords spoken that are merely vituperative, or *insulting, or imputing only* disorderly or immoral conduct, or ignoble habits, propensities or inclinations, or the want of delicacy, refinement or good breeding, are *not* regarded by the common law as sufficiently substantial to be treated as injuries calling for redress in damages." Moseley M. Moss, 1850 WL 3029, *3, 47 Va. 534 (Va. 1850). Statements that impute conduct to a person which tends to injure him in his business or profession are actionable as defamation per se. Fleming v. Moore, 221 Va.884, 889, 275 S.E.2d 632, 635 (Va. 1981) (quotes omitted).

Not all defamatory statements, however, are actionable. Certain expressions of pure opinion, albeit defamatory, are not actionable as a matter of law. Chaves v. Johnson, 230 Va. 112, 119, 335 S-E.2d 97, 101-02 (Va. 1985). For a statement of opinion to be actionable, it must contain provably true or false factual connotations, see Milkovich *v.* Lorain Journal Co., 497

2.The common law recognizes other defamatory words *that* are *actionable per se,* namely words that impute to a

person the commission of some criminal offense involving moral turpitude or words alleging that a person is infected with some contagious disease, which, if true, would exclude the party from society. Fleming, 221 Va. at 089, S.E.2d at 635. S. 1, 18 (1990); Chapin v. Greve, 787 F. Supp. at 563, and it must be reasonably interpreted as an assertion of fact. Age Biospherics, Inc. v. Forbes, Inc., 151 F.3d 180, 184 (4th Cir. 1998); Milkovich, 497 U.S. at 20.

Whether a particular statement is one of fact or opinion is a question of law for the court. Lapkoff v. Wilks, 969 F.2d 78, 81-82 (4th Cir. 1992). To determine whether the statement in issue can be reasonably interpreted as an assertion of fact, the Milkovich court looked to the language used, ij e, whether it was "loose, figurative or hyperbolic language which would negate the impression that the [speaker)" was stating fact, and the context and "general tenor" of the statement. Biospherics, 151 F.3d at 184; see also Lapkoff, 969 F.2d at 82 (holding that, "[i]n determining whether a statement expresses an actual fact about an individual such that the comment is actionable or whether the comment is a non-actionable opinion, the court may consider the type of language used, the meaning of the statement in context, whether the statement is verifiable, and the broader social circumstances in which the statement was made").

Having analyzed the statements made in this case in light of the foregoing analysis, the Court holds that they may properly be considered defamatory under Virginia law. Specifically, the Court holds that Defendant's statement that

> Plaintiffs "mistreated and ripped off" customers "by selling them retitled out-of-state cars that anything could have happened to and virginia still gives a good clean **title** for, or charging for work not done as expected or charging for new parts when they were used. . . on and on . . , .",

contains factual assertions which are provably false. Accordingly, it is actionable under Virginia law. However,

the Court holds that Defendant's reference to Mr. Farrell as "feral" is not actionable under Virginia law, as it does not meet this requirement. The Court reserves judgment with respect to the March 7, 2001, statement, which the Court believes must be placed in its proper context before any ruling may be made with respect to its defamatory nature.

Having ruled on the defamatory nature of the statements, the Court next turns to the issue of whether Farrell is a "limited purpose public figure" under Virginia law such that a higher standard of proof is required in this case. In order to impose this standard on a plaintiff, Virginia law requires that a defendant establish that:

> (1) the plaintiff had access to channels of effective communication; (2) the plaintiff voluntarily assumed a role of special prominence in the public controversy; (3) the plaintiff sought to influence the resolution or outcome of the controversy; (4) the controversy existed prior to the publication of the defamatory statement; and (5) the plaintiff retained public figure status at the time of the alleged defamation,
> [10]

Foretich V. Capital Cities / ABC, Inc., 37 F.3d 1541, 1553 (4th Cir. 1994).

Here, Defendant contends that Farrell is *a* limited use public figure based on; (1) Farrell's name being mentioned in articles appearing in leading automobile magazines, as well as his access to interactive message boards allegedly used by Defendant; (2) his alleged assumption of a significant role in the ongoing discussion regarding the modification of RX-7 automobiles; (3) his alleged attempt to influence the outcome of some *controversy* regarding RX-7s by interjecting himself into the discussion; (4) the fact that the discussion occurring on the internet pre-dated the statements alleged in the Complaint; and (5) Farrell's prominence in the world of RX-7s. (Def.'s *Mot. to* Dismiss at 10-11.)

Having reviewed the applicable case law, the Court

flatly rejects Defendant's arguments. The Fourth Circuit has defined a "public controversy" as "a real dispute, the outcome of which affects the general public or some segment of it.'" Blue Ridge BaLik v. Veribanc, Inc., *866 5.2d 681, 688 ri.12 (4th* Cir. 1989) (quoting McDowell v. PaiewonsXy, 769 F.2d 942, 949 (3d Cir. 1985)); see also Foretich, 37 F.3d at 1554-55. The ongoing discussion regarding the modification of RX-7s unquestionably fails to satisfy this definition, as it cannot possibly be said that the outcome of such a dispute affects even a segment of the general public. Furthermore, even if Defendant could meet this definition, Farrell's single posting on the internet, even when coupled with his appearance in magazine articles, does not qualify as the assumption of a prominent role in the controversy. Nor does it *indicate an* attempt to influence the outcome of any such controversy. Accordingly, the Court holds that Farrell is not a limited use *public figure.*

Finally, the Court turns to the issue of whether Defendant's statements are privileged under Virginia law. As the Supreme Court of Virginia has held, "[a) communication, made in good faith, on *a* subject matter in which the person communicating has an interest, or owes a duty, legal, moral, or social, is qualifiedly privileged if made to a person having a corresponding interest or duty." Great Coastal Express, Inc. v. Ellington, 230 Va. 142, 153, 334 S.E.2d 846, 853 (1985). "It is for the court, not the jury, to determine whether a privilege exists, whether it *is qualified or* absolute, and so to instruct -the jury." Id. Here, in light of the fact that Defendant's statements concern his automobile (which he believed in good faith Plaintiffs had failed to properly modify and in which *be* clearly has an interest) and were made to others *having* a corresponding interest, the Court finds that such a privilege does exist.

The Court notes, however, that a *jury may* find that the privilege *is* lost if it believes that the words were spoken, [12] inter alia, with actual malice or through the use of "language which was intemperate or disproportionate in

strength and violence to the occasion and which was unnecessarily defamatory of the plaintiff," or if Defendant made such statements "Without an honest belief in their truth." id. Therefore, the Court will likely submit the issue to the jury, which will be instructed in accordance with the parameters set by the Supreme Court of Virginia in Great-Coastal Express. See id.

C. Count VI

Defendant challenges Plaintiffs' civil conspiracy claim on the ground that it fails to specifically describe any actions taken by Defendant in furtherance of the conspiracy. Plaintiffs respond that the allegations contained in the Complaint satisfy Virginia law, which requires only that they prove "(1) a combination of two or more persons fox the purpose of willfully and maliciously injuring plaintiff[s] in (their] business, and (2) resulting damage to plaintiff[s]." Allen Realty Corp. v. Holbert, 227 Va. 441, 449, 318 S.E.2d 592, 596 (1984).

Having reviewed the Complaint, the CoLirt agrees with Plaintiffs. As Plaintiffs correctly note, Virginia law requires that they prove only legal malice, as opposed 'to actual malice, meaning that they need only prove that Defendant "acted intentionally, purposely, and without lawful justification-" Commercial Business Systems, Inc. v. BellSouth Services, Inc., [13] 249 Va. 39, 47, 453 S.E.2d 261, 267 (1995). In light of Rule 8's liberal pleading requirements, the Court concludes that Plaintiffs have clearly established the elements necessary to state a claim for civil conspiracy in this case by alleging, inter alia, that Defendant assisted Duff and Penner in a coordinated effort to attack them. See Compl. IT 18, 23, & 25. Accordingly, the Court holds *that Plaintiffs* have properly stated a claim for civil conspiracy in Count VI of the Complaint.

IV. Conclusion

For the foregoing reasons, Defendant's Motion to

Dismiss will be granted as to Count I, and denied as to all other Counts, An appropriate order shall issue.

April 25th 2002
Alexandria, Virginia
UNITED STATES DISTRICT JUDGE

Appendix D — Order of the United States Court of Appeals for the Fourth Circuit Denying Petition for Rehearing and Rehearing En Banc Dated and Filed December 30, 2003.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
December 30, 2003

No. 02-2230; CA-01-0173-A

PETER FARRELL SUPERCARS, INCORPORATED; PETER FARRELL

Plaintiffs - Appellants

v.

GORDON MONSEN

Defendant - Appellee

and

DAVID C. PENNER; JOHN ROBERT DUFF, JR.; MALLOY WOODBRIDGE, LLC;
MALLOY LINCOLN MERCURY, INCORPORATED

Defendants

On Petition for Rehearing and Rehearing En Banc

The appellants' petition for rehearing and rehearing en banc or in the alternative, motion to publish opinion under Local Rule 36(b) was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc or in the alternative, motion to publish opinion is denied.

Entered for a panel comprised of Judge Niemeyer, Judge Williams, and Judge Duncan.

For the Court,
/s/ Patricia S. Connor CLERK

Appendix E — Statutes

Sec. 1331. - Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States

Sec. 1367. - Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if -
(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
(3) the district court has dismissed all claims over which it has original jurisdiction, or
(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.